

MODERN REPORTS;
OR,
SELECT CASES
ADJUDGED IN
THE COURTS
OF
KING'S BENCH,
CHANCERY, COMMON PLEAS,
AND
EXCHEQUER.

VOLUME THE EIGHTH.

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VOLUME THE EIGHTH;

CONTAINING,

CASES in the KING'S BENCH, from the Eighth to the Twelfth Year of
KING GEORGE THE FIRST.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

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T H E
P. R E F A C E.

LAW and EQUITY, the subjects of the ensuing Cases, must be allowed to be the supreme excellencies in all civil governments ; and as no nation can possibly exist without those rules and sanctions, so their establishment and advancement will be acknowledged to be the chief honour and glory of THE PRINCE, as well as the highest security and happiness of THE PEOPLE.

THE FIRST PART contains Cases argued and adjudged in the Court of King's Bench, from the beginning of *Michaelmas Term* 1721 to the end of *Trinity Term* 1726, wherein are illustrated and explained, not only many of the most modern (which are always the best established) rules of practice and methods of proceeding in that court, but many useful and curious points, relating to the rights and prerogatives of the Crown, as well as to the private and particular rights of the subject ; in the arguing and debating whereof, not only divers former abstruse opinions are cleared up and settled, but likewise many antient and modern statutes illustrated and explained.

THE PREFACE.

THE LATTER PART (a) of this Collection consists of some selected Cases argued and decreed in the High Court of Chancery, between *Easter Term*, in the eighth year, and *Trinity Term*, in the eleventh year, of *George the First*, inclusive ; wherein not only divers of the points and statutes before-mentioned are expounded and determined by an equitable construction, but also several instances of relief given in cases not relievable at law.

It also contains the three following Cases on Appeals

FIRST, The case of *Trevor v. Trevor*, relating to marriage-articles and divers other settlements, made by Sir JOHN TREVOR, late *Master of the Rolls*, decreed and appealed in 1719.

SECONDLY, The case of *Roper v. Radcliff*, on the statute 11. & 12. *Will. 3. c. 4.* for disabling papists to purchase lands, decreed and appealed about the year 1713, with two learned and elaborate arguments on the hearing of that cause.

THIRDLY, The case of the *Lord Derwentwater*, upon an appeal from the commissioners of forfeited estates, heard before the Judges thereto delegated, the sixteenth day of *February* 1718, in the fifth year of *George the First*.

(a) The latter part here alluded to now forms the ninth volume of these Reports.

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T O T H E

S E C O N D E D I T I O N.

THE EDITOR having been favoured with a sight of many marginal Notes, and Corrections made soon after this Book was published, by a Gentleman then at the Bar, for his own private use, and founded upon contemporary notes of the cases therein contained, and judging from such marginal notes and corrections “that the book “must have been exceedingly imperfect and erroneous,” has done his best endeavours to supply the defects of the former wretched edition.

He has, besides, added many references to Books of Reports published since, which comprehend a period of near forty years.

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MICHAELMAS TERM,

The Eighth of George the First,

1721.

I N .

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*

Sir Robert Eyre, *Knt.*

Sir John Fortescue Aland, *Knt.*

} *Justices.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

[1]

* Stratford against Neale.

Case 1.

Friday, 17 November, 1721 (a).

Easter Term, 3. Geo. 1. Roll 184.

W RIT OF ERROR on a judgment given in the court of king's bench in *Ireland* (b).

The case was thus : One *Neale* libelled in THE SPIRITUAL COURT there for *two third parts* of the tithes due to him for *dry cattle* fed in such a parish, &c.

defendant plead a right to *two integral parts* of the tithes of dry cattle, *CONVARIANCE* between the libel and the declaration is not material. — Yelv. 79. 6. Com. Dig. " Prohibition. " (K.). 1. Mod. 182.

(a) This case was argued once before, *Friday*, 27 January 1720, and five more exceptions were taken ; which see in Fortesc. Rep. 350. The case at large, with both the arguments, and the opinion of the Court, are in Stra. 482. — NOTE to former edition.

(b) The writ of error to the king's bench in *England* on judgments given in the courts in *Ireland* is taken away by 23. Geo 3. See Mr. Christian's edit. 1 vol. Bl. Com. 104. and Mr. Serjeant Runnington's fifth edit. of Hale's Com. Law, vol. ii. page 7 to 18. note (A).

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against
NEALE.

The defendant suggested, for a *prohibition*, that the cattle for which those tithes were demanded were *beasts of the plough*, and other *dry cattle* fed in the said parish with hay and stubbles of corn, for which tithes had already been paid.

A PROHIBITION was thereupon granted; and that the right might come in question, *Stratford* was ordered to declare upon the prohibition; which he did, and in the same manner as before he had suggested, and concluded his declaration, that the defendant had proceeded in the spiritual court after a prohibition delivered, &c. *et contra prohibitionem, &c.*

The defendant pleaded, that the cattle for which he had demanded the said tithes were not such as the plaintiff had set forth in his declaration, nor fed with such hay and stubbles for which tithes had already been paid: and then pleaded, that he had a right to *two integral parts* of the tithes of all dry cattle fed in that parish; and that he had not proceeded *contra formam prohibitionis, &c.*

Upon this they were at issue; and the defendant had a verdict and judgment for a *consultation*; which was awarded.

* [2]

* On this judgment the now plaintiff brought a *writ of error*.

IT WAS INSISTED for him, that there was a *variance* in the pleadings, and that the verdict would not support this judgment.

FIRST, As to the *variance* in the pleadings, *viz.* the plaintiff in the spiritual court had by his libel demanded *two third parts* of the tithes due to him for dry cattle, &c. and being defendant in the action, he claimed a right to *two integral parts* of the tithes, &c. so that his plea varies from his libel, and therefore a consultation should not be awarded, because that gives him a power to sue for any thing not in the libel; therefore he has made no sufficient title.

TO WHICH it was answered, that the awarding a *consultation* is no more than giving the defendant liberty to proceed on his former libel in the spiritual court, and consequently if there be any variance between the libel and the plea, it is no cause to reverse the judgment, because the consultation gives him no new power to sue for any thing, but only to proceed on that very libel which he had already exhibited; that it is a matter of appeal, not of prohibition: but however that there could be but one part remaining.

Leon. 115.
13. Co. 58. 89.

THE COURT was of opinion, that the awarding a *consultation* is no more than setting aside the *prohibition*, and giving the plaintiff in the spiritual court liberty to proceed on his libel; and that the *variance* between his libel and his plea is not material; for though in the one *two third parts* are demanded, and in the other *two integral parts*, yet that must be understood *secundum subjectam materiam*.

SECONDLY, As to *the verdict*, it was objected, that the jury found that the cattle for which the said tithes were demanded were not fed with hay and stubbles for which tithes had been already paid, but they did not find that there were any proceedings in the spiritual court after a prohibition delivered.

A verdict on a declaration in prohibition, finding all the material parts of the issue, is good, although the jury do not find any thing respecting the proceedings after the prohibition; for the allegation of the contempt is merely matter of form.

IT WAS INSISTED *for the plaintiff* in this action, that if all the issues are not found, this judgment cannot be supported; and it is part of this issue, that the defendant had proceeded in the spiritual court after a prohibition delivered; and if this had been found, then the plaintiff would have been entitled to damages. It is true, if an issue be joined on part of a thing in suit, and that part is found by the jury, such a finding will support the judgment; but when several issues are joined, as in this case they are, and some are found, and some not found, the verdict is insufficient (a). (*Quod Cur. concessit.*) It is certain, that the plaintiff would have been entitled to damages if this matter had been found; for the case of *Anger v. Bower* (b) is an authority in point, where it was found, and the plaintiff had judgment for his damages. It is true, that judgment was reversed, but it was because the plaintiff had not laid a *venue* where the proceedings were, &c. after the prohibition delivered.

S. C. 1. Stra. 482.
Fort. 350.
Cro. Eliz. 854.
2. Lev. 111.
Stra. 843.
Id. Ray. 1518.
1. Will. 44.
5. Com. Dig.
"Pleader"
(S. 19.).

* [3]

TO WHICH *it was answered*, that this objection is only to matter of form, which is cured by the verdict (c); for the not finding * any proceedings by the defendant after a prohibition delivered, and *contra prohibitionem*, is merely formal, and like the not finding the breaking and entry *vi et armis* in an action of trespass (d).

THE COURT. It is true, that where several issues are joined, a verdict which finds one, and not the other, is not good; but in this case the not finding any proceedings in the spiritual court *contra formam prohibitionis* is but matter of form. However, this verdict has found all the material parts in issue; and therefore it is sufficient to support this judgment. The alledging in the declaration, that the plaintiff in the spiritual court proceeded there *contra formam prohibitionis* is but a supposed contempt, and suggested by the plaintiff in the action as a ground for a *prohibition*, and the not finding this contempt is altogether immaterial; it is the same with not finding *vi et armis* in an action of trespass. It is true, that there are precedents both ways; but in such cases the Judges always follow that which is least prejudicial. As to the case of *Anger v. Bower*, there was actually a proceeding after a prohibition granted; and this was found by the jury, and damages assessed; but the *venue* being laid in a wrong county, the jury could not subject the defendant to pay the damages; and therefore that judgment was set aside; so it is out of this case. Besides, if the plain-

(a) 3. Lev. 39. 55. W. Jones, 447. (c) 1. Saund. 81. 140. Show. Cas. Parl. 1. Roll. Abr. 515. 575. Plowd. 471. 201. Bishop v. Needler, Plowd. 458.
T. Jones, 128. (d) Rait. Ent. 490. Townsend's Tables, 172. Leon. 240.

Michaelmas Term, 8. Geo. 1. In B. R.

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tiff would have any advantage by the defendant's proceeding after a prohibition, this being matter of evidence, he should have proved it at the trial, and insisted on his damages; which he has not done.

THE JUDGMENT, therefore, was affirmed by the whole Court,

* [4]

Case 2.

The King against Clegg.

Tuesday, 7 November 1721.

The sessions may make an original order of bastardy, but the party ought to be summoned; &c. and therefore the Court will intend a summons, though not stated in the order.

S. C. 1. Stra.
475.

THE DEFENDANT Clegg was, by an order of sessions made by two justices of the peace (a), adjudged to be the putative father * of three bastard children; and it was ordered, that he should pay ten pounds to the overseers of the poor of the parish of, "son of those bastard children," and two shillings and sixpence every week "for so long time as the said children, or any or either of them, should be chargeable to the said parish."

IT WAS INSISTED on Clegg's behalf, that the order was irregular.

FIRST, Because it did not set forth that Clegg was duly summoned to appear before them. It is true, it set forth that he had notice to appear, but did not shew for what cause; and therefore it is no regular summons. Nor does it appear that he was ever heard. This order being made at the sessions is very different from an order made by two justices, because from that the party has a right of appeal (b).

PRATT, Chief Justice. No notice seems necessary. In the case of *The King v. Simpson* (c), upon a conviction for deer-stealing, after long deliberation, we adjudged that he might be convicted without his general appearance (d).

EYRE, Justice. The reason why it is not necessary to shew a notice in an order of two justices is, because the party has an appeal to the sessions, where he may be heard. It was never fully determined until *Easter Term*, in the eleventh year of *Queen Anne*, that the sessions has original jurisdiction of bastards. The statute of 3. Car. 1. c. 4. which has given the sessions jurisdiction, has given them the same power as the two next justices have by the 18. Eliz. c. 3.; and if so, why cannot an appeal lie to the next sessions from this order as well as if it had been made by two justices? Besides, this being an order made by the sessions in a matter

(a) It was an order made originally at the sessions.

(b) See the case of *Reg. v. Cripps*, *Easter Term 11. Anne*, Sett. & Rem. page 38. pl. 63.; *Rex v. Austin*, post. 309, 310.; *Rex v. Venable*, post. 377. 378.

(c) Hilary Term 3. Geo. 1. *Strange*, 46.

(d) *Stra.* 44. 10. Mod. 248. 341. 378. *Gilb. Cases*, 282.—See also *Boscawen on Convictions*, 52 to 57.

of which they have jurisdiction, we ought to intend their proceedings regular, when the contrary does not appear.

THE KING
against
CLEGG.

Cro. Car. 470.
pl. 2.

FORTESCUE, *Justice*. As to the want of notice, natural justice requires that every man shall be heard before he is condemned in judgment, unless through his own default. But though every person accused ought to be summoned, yet the question will be, whether such summons must of necessity appear upon the record. A summons is always set forth in case of a *manamus*; and in a conviction for deer-stealing, as in this case, it shall be intended that the defendant was summoned, since the contrary does not appear (a). This exception was made in the case of an order for removing an apprentice; but it was over-ruled on the supposition of regularity.

PRATT, *Chief Justice*. I do not understand the distinction which has been taken when we are to presume the proceedings by justices regular, and when not; for we are to examine all their proceedings upon a supposition of irregularity. The case of *The Queen v. Lunn* (b) I heard LORD PARKER, when *Chief Justice*, deny for law; and I shall never give any opinion to confirm such an order; for whether the wages were due for husbandry or not, was the point of their jurisdiction; and surely we can never intend them to have jurisdiction of what they do not shew to be within their jurisdiction. As to the argument that no notice is necessary, because an appeal lies to the next sessions, I do not see how an appeal can lie from one sessions to another, since it is the same court, though composed of different persons. It is admitted, that the justices of peace have an *original jurisdiction* in cases of *bastardy*, and that their orders, if regular, shall be conclusive (c); but if irregular, as this is, they shall be quashed.

SECONDLY, It was objected, that the two justices have no power to charge him with a sum in gross; and the case of *The Queen v. Stevenson* (d), in *Michaelmas Term*, in the tenth year of *Queen Anna*, was cited.

The putative father of a bastard child may, by 18. Eliz. c. 3. be charged with a sum in gross.

THE COURT. A *putative father* may be charged with a sum in gross, though this is seemingly against the statute 18. Eliz. c. 3. by which the power given to the two justices is to charge the mother, or reputed father, with the payment of money weekly, but they have likewise power to take order for the relief of the parish, which must be intended against the charge which it may sustain, as well as against the charge already sustained (e).

(a) Reg. v. Lunn, Trinity Term 37. June, 5. Mod. 204.

(b) 6. Mod. 204.

(c) See Rex v. Greaves, Dougl. 633. where it is settled, that the sessions have, in this case, an original jurisdiction.—See also Slater's Case, Cro. Car. 471.; Wood's Case, 2. Bullt. 355.; and Mr. Const's edition of Bott's Poor Laws, 1 vol. page 442.

(d)

(e) See Rex v. Eve, 2. Show. 256.; Rex v. Skin, 1. Bott P. L. 421.; Rex v. Odam, 1. Salk. 124.; Rex v. Willey, 1. Bott P. L. 436.; Rex v. Gravefend, 1. Bott, 437.; Rex v. Holland, B. R. H. 160.; Rex v. Taylor, 3. Burr. 1679.

Quare, If one order can charge a man with being the father of three bastard children.

THIRDLY, It was objected, that *Clegg* was charged to be the father of three bastard children by one order, when there should be as many orders to charge him as there were bastards.

But THE COURT, as to this matter, gave no judgment.

The justices cannot order a putative father to give security to perform the order.

FOURTHLY, It was objected, that the defendant is ordered to give security for the performance of the order, which is illegal.

PER CURIAM. The justices cannot order security, unless in the case of a contempt (a). Let that part of the order be discharged.

And it was adjourned as to the rest, in order that the parish should have time to shew whether *Clegg* was regularly summoned to appear before the two justices who made this order (b).

(a) Reg. v. Chaffey, 2. Ld. Ray. 858. 3. Salk. 66. ; Rex v. Messinger, 1. Bott P. L. 418. pl. 550. ; Rex v. Fox, 1. Bott P. L. 422. pl. 555. 1. Bac. Abr. "Bastardy" (D.).

(b) In Trinity Term 12. Geo. 1. this case was moved again, and the order was confirmed without opposition, S. C. 1. Stra. 475.—See also Rex v. Austin, post. 309, 310. and the case of Rex v. Venables, that it is not necessary to set forth in the order that the party was summoned, although the justices are punishable for

making an order without summoning the party, Post. 378. 1. Stra. 630. 2. Ld. Ray. 1405. Rex v. Hawkins, 1. Bott P. L. 427. ; Rex v. Cotton, 1. Sess. Caf. 179. ; Rex v. Neal, 1. Bott P. L. 429. But in the case of convictions by justices of the peace, it seems, that the party must not only be summoned, but that the summons must, in point of fact, be shewn upon the conviction, Reg. v. Dyer, 1. Salk. 181. ; Rex v. Simpson, 2. Stra. 46. ; Rex v. Mallinson, 2. Burr. 679.

* [5]

Case 3.

* The King against Walter.

A defendant in custody must be tried within two Terms after the commitment.

THE DEFENDANT was committed by a warrant under the hand and seal of a justice of the peace for being "a notorious outlaw and juggler."

Being in custody, he brought a *habeas corpus*, and moved by his counsel to be discharged.

FIRST, Because he had been in gaol two Terms since the indictment was found, and was not yet brought to his trial.

THE COURT allowed this first objection, viz. that the defendant ought to be tried within two Terms after his commitment, according to the *habeas corpus* act (a).

(a) By 31. Car. 2. c. 2. s. 7. "If a person shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, and upon his petition in open court the first week of the Term, or first day of the sessions, to be brought to his trial, shall not be indicted some time in next Term or sessions after such commitment, the Court, on motion in open court the last

" day of the Term or sessions, shall let the prisoner to bail, unless it appear on oath that the witness for the king could not be produced the same Term or sessions : and if any person so committed, upon his prayer in open court as aforesaid, shall not be indicted and tried the second Term or sessions after his commitment, he shall be discharged from his imprisonment."

SECONDLY,

Michaelmas Term, 8. Geo. 1. In B. R.

SECONDLY, It was objected, that the charge in the warrant of commitment is very loose, viz. for that the defendant was "a notorious owler and smuggler," which is not a sufficient charge to deprive a subject of his liberty, especially in a criminal cause, where the utmost certainty is required (a):

THIRDLY, It does not appear that the defendant was charged on oath (b).

FOURTHLY, No time is alledged when the fact was committed (c).

The commit-
ment of a person
as "a notorious
owler" is good.

A warrant of
commitment is
good, although
it do not appear
that the charge
was on oath, or
when the fact
was committed.

BUT THE COURT, as to these other objections, held, that a justice of peace must take care that he has such an information of the fact as may be sufficient to support his warrant of commitment; but that he need not set it forth in the warrant itself, because so much certainty is not required in warrants as in writs and pleadings, which are always on record.

THE COURT was of opinion to bail him; but he, having no bail was remanded.

- (a) See 2. Hawk. P. C. ch. 15. s. 16. 2. Hale P. C. 122. Rex v. Evered, Cald. Cases, 26. and Rex v. Judd, 2. Term Rep. 255. (b) 2. Hawk. P. C. ch. 16. s. 17. 2. Inst. 356. 4. Com. Dig. "Imprisonment" (H. 7.) (c)

The King against Archbishop of Armagh and Jackson. Case 4.
Wednesday, 15 November 1721. * [6]

A WRIT OF ERROR on a judgment in the king's bench in Ireland. The case was thus:

If the king be
seised of a vicar-
age, and the
archbishop of a
rectory situate in
the same parish,
in Ireland, and
the incumbent
of the vicarage
dies, the arch-
bishop cannot,
during the va-
cancy, unite the
two churches by
virtue of the
statute 17. Car. 2.
c. 3.; but if the
vicarage had
been full, the
union might
have been made,
for the statute
binds the king,
although he is
not expressly

THE KING was seised of the advowson of the vicarage of *Louth*, in the diocese of *Armagh*; and the *Archbishop of Armagh* was seised of the advowson of the rectory of, &c. near the said vicarage, and being so seised, the king's incumbent died; and, after the said vacancy, the archbishop, by an instrument under his archiepiscopal seal, united both the said livings, according to the power which he had by the statute 17. Car. 2. c. 3. The statute enacts, "That, in every city or town corporate, and their liberties, where there are two or more churches or chapels, and parishes thereunto belonging, the bishop of the diocese, with the consent of the chief officer or officers there, or the major part of them, and of the patrons of such churches, may unite the n, &c. and the parishioners shall pay all tithes and other duties to the incumbent of the church to which the other is united; but that notwithstanding such union, the parishes shall continue distinct as to all rates, taxes, and parochial rights, and churchwardens shall be appointed for each parish as before the union. And where one or both of the said churches are full at the time of the union, it named.—S. C. 1. Stra. 516. 2. Roll. Abr. 778. Cro. Eliz. 500. Burnard, K. 34. 42. 170. 285. 7. Stra. 837. Fortesc. Rep. 213. Faggle, 30. 1. Com. Dig. "Advowson" (F.).

THE KING *against* ARCHBISHOP OF ARMAGH AND JACKSON. "shall take effect at the next avoidance after; and the patrons shall present by turns to that which remains, &c. and that he whose incumbent dies first shall first present, and afterwards by turns successively for ever." The king's incumbent being dead, and the vicarage being afterwards united to the rectory as aforesaid, THE KING presented another vicar, and *the archbishop* refusing to admit him, a *quare impedit* was brought against *the archbishop*, and judgment given against him in the king's bench in *Ireland*.

Upon which the archbishop brought a writ of error in this court.

THE GREAT QUESTION was, Whether, since the one^d advowson belongs to THE CROWN, there can be any union by virtue of the act, *i. e.* whether THE KING is bound by the general words of the statute.

THE SECOND POINT was, Whether any union could be made when one of the churches was vacant.

THE COUNSEL for *the Archbishop* argued, that by the general words of this statute this was a good consolidation, although it was made after the avoidance of the vicarage by the death of the king's incumbent. The king's ordinary right shall be bound by such general words in an act of parliament, which in this case was his right of presentation; though a right, which he has by any prerogative, shall not be bound by such words (*a*). Every statute which is made for the advancement of justice, for the establishment of religion, to suppress wrongs, to perform the will of the donor, to maintain the poor, or for the encouragement of learning, shall bind the ordinary right of the king by general words as well as the right of the subject (*b*); and this statute has two of these purposes, *viz.* the establishment of religion, and the encouragement of learning. This is proved by every saving of the king's right in an act of parliament, for it shews that his right would be bound, if it was not saved.

* [7] ON THE OTHER SIDE *it was argued*, to support this judgment, that by the statute before-mentioned a new power is created, and consequently it must be literally performed, which, in this case, was not done; nay, it is impossible to be done, because it is enacted, "that after the union, the patron whose * incumbent first dies shall have the first presentation;" which shews, that the Legislature intended that both the churches should be full at the time of the union (*c*), for otherwise the right of survivorship could never take place. Now here one was void when it was united to the other, and after it was consolidated to the other there was but one incumbent, and if but one incumbent, then it is impossible that those words in the statute can ever be satisfied, *viz.*

(*a*) 2. Roll. Abr. 778. Cro. Eliz. 500. Dyer, 24. a.

(*b*) 2. Inst. 360. 681. 5. Co. 14. 11. Co. 66. 72. Plowd. 248, 1. Roll. Rep. 151.

(*c*) Puller v. Hutchinson, T. Jones, 160. S. C. 3. Lev. 95.

“ that he whose incumbent first dies shall first present,” for these words import, that both the incumbents must be living at the time of the union. Now here the king’s incumbent was dead before the union, and consequently a right was vested in THE CROWN to present another ; and it would be very hard, and what was never intended by this statute, to divest the king of that right by such a union as was made by the archbishop in this case. Besides, it may be reasonably intended that the king is not comprehended in this statute, because the union is to be at the equal expence of both patrons, and by their consent ; and it would be indecent that the king should join with a subject in the expence of a commission. It is true, this union creates a new parsonage, and the church being full of the archbishop’s incumbent, he may claim a right to both ; but that can be no objection, because in a *quare impedit* plea, narty is no plea against the king’s right, though given by the statute of *Westminster the Second*, c. 5. which is general, and does not name the king ; for if the king is not named, the general words of an act do not bind any prerogative or royal interest vested in him.

THE KING
against
ARCHBISHOP
OF ARMAGH
AND JACKSON.

11. Rep. 72.
7. Co. 32.
3. Lev. 382.

Upon the whole matter it was admitted, that the words in this statute are general, and that the right of the crown may seemingly be bound by them : but though the words are general, yet they ought to be specially construed, to avoid an apparent injury ; for the intent of the act was to put things in an ordinary and regular method, and not to divest either of the patrons of their respective right, and such a construction would be conformable to the intent of the Legislature, viz. that all unions should be made by the consent of both patrons, and not to the damage of either ; and that the churches should be united when there are two incumbents living, because the statute gives the right of presentation to that patron whose incumbent should first die, which might happen to be the king’s incumbent ; but now, by this union, he is deprived of that surviving and contingent right of presentation, which is an apparent damage done to the crown.

THE COURT was of opinion, that this statute never intended that any union should be made of two churches after an avoidance in one ; for by the common law, by which this act must be construed, there could be no union but by the consent of both patrons ; neither could it be made *in presenti*, but by the consent of both the incumbents, though the patrons agreed to unite ; though it might be made *in futuro* without the consent of the incumbents. Therefore it would be very hard to construe this statute so as to make a union good, where both the churches are not full at the time the union is made ; for it is not so by the canon law in cases of presentation and consolidation, and it is that law which should direct in this case. It is clear, that the king cannot be divested of any of his prerogatives by general words in an act of parliament (a), but that there must be plain and express words for that

* [8]

(a) Hob. 143.

THE KING
against
ARCHBISHOP
OF ARMAGH
AND JACKSON.

purpose, though all his other rights are no more favoured in law than the rights of his subjects; and it is likewise clear, that general words in an act of parliament may be qualified by subsequent sentences or clauses in the same statute: but certainly it was never the intent of the Legislature by this act to work a wrong to any patron; but if this union should be good, it would divest the king of that right which was already vested in him to present to this vicarage; and such a construction of the statute would be a damage not only to THE CROWN, but it may happen so to be to several other patrons. Besides, in this case, there being two benefices united after an avoidance in one, it is plain that *the Archbishop* made the union for his own benefit, which is against a principle in law.

As to the plenary which the defendant pleaded to this *quare impedit*, THE WHOLE COURT agreed, that it was not a good plea in bar to the king's right; and that was the principal reason why the court of king's bench in *Ireland* gave judgment for the king.

But as to some other points there were various opinions.

ALL FOUR OF THE JUDGES held, that the union was not good, because it was made after an avoidance of one of the churches united.

FORTESCUE, *Justice*, said, that would be a proper question; AND HELD, that it was good, but that it was not to take effect until after the king had presented to the church.

EYRE, *Justice*, held, that by the union the church united was extinct, and that he did not know in what manner the king could present to a church which was extinct.

FORTESCUE, *Justice*, held, that the church was not extinct by the union, because it was a spiritual act, which did not extinguish the church as to the right of either patron; for if one church had been *appendant* and the other *in gross* before the consolidation, they would be so after it.

PRATT, *Chief Justice*. As to the chief point—I think, as now advised, that the king will be bound by the general words of this statute, he having no right, in this particular, distinct from the right of a subject.

[9]

* But, for the reasons before-mentioned, THE WHOLE COURT agreed, that the judgment in *Ireland* should be affirmed (a).

NOTE, There was another objection, *viz* that it ought to have been averred that the archbishop was the bishop of the diocese, and the union to have been set forth under the seal episcopal as well as archiepiscopal. But THE COURT took no notice of it.

(a) It was adjourned now, but in *Easter Term* following it was argued again, and the judgment was then affirmed. The first argument was only upon the second point, the Court having been clearly

of opinion upon the first (as was admitted by the defendant's Counsel) that the king was bound by the statute. NOTE to former edition.

MICHAELMAS TERM,

The Eighth of George the First,

A T

The Sittings

BEFORE

Sir Peter King, *Knt. Chief Justice*

OF

THE COURT OF COMMON PLEAS.

Monk *against* Graham.

Case 5.

ONE *Hackett* bought stock to the value of seven hundred and fifty pounds in the third subscription in the *South Sea Company*, and received fifty pounds a-year for it, and afterwards sold it, which by several mesne conveyances came to the now plaintiff *Mrs. Monk*, who purchased it for a thousand pounds. She, living in the country, entrusted one *Rosse*, who was an officer of the exchequer, with the minutes, and an order to receive this fifty pounds a-year for her use, the said *Rosse* being then a man of credit, and discounting for at least thirty thousand pounds a-year of the revenue. Afterwards *Rosse*, pretending that he had a power to sell the said stock, made an agreement in writing with the defendant *Graham* to sell it to him for nine hundred and ninety-four pounds, and told him the plaintiff would sign the transfer, but he got another woman to personate the plaintiff, and to sign the transfer (a); and at the next opening of the books of the Company he got the same transferred to the defendant, and made affidavit of the sale, and got it entered in the said books, this being required by act of parliament to every transfer, and then he withdrew himself out of the kingdom, so that he could not be found. The plaintiff hearing that *Rosse* was withdrawn came to *London*, and demanded the stock of the defendant, who told her, that he had bought it of *Rosse*, and had got the minutes, the transfer, and

If an agent entrusted by a stockholder to receive the yearly dividends make a fraudulent sale of the stock by means of a pretended power of attorney, and transfer it by personating the proprietor, and abscond, the proprietor may recover the original price paid for the stock in an action of *trover* against the vendee.

1. Leon. 158.

1. Will. 8.

2. Stra. 1187.

Saik. 283.

2. Term Rep.

376.

4. Term Rep.

250.

(a) By 8. Geo. 1. c. 22. this is now made felony without benefit of clergy. See 1. Hawk. P. C. ch. 58.

the

Michaelmas Term, 8. Geo. 1. At Nisi Prius.

Monk
against
GRAHAM.

the affidavit, which were all the conveyance the law could give; and believed, that if she had any title she had nothing to shew to make it appear, and therefore she came too late to make any demand on him. Afterwards the defendant, though forbid by the plaintiff, sold this stock for one thousand and ninety pounds to T. S. who sold it again to R. W. for eleven hundred and nine pounds.

And then the plaintiff brought an action of TROVER against the defendant.

Allen, 93.
2. Stra. 1178.

And SIR PETER KING, *Chief Justice*, notwithstanding her folly in trusting *Rosse* with the minutes, which the Counsel for the defendant did much rely on, directed the jury to find for the plaintiff, which they did, and gave her no more than seven hundred and fifty pounds damages.

MICHAELMAS TERM,

The Eighth of George the First,

I N

The King's Bench.

1721.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

* [10]

* The Churchwardens of Bishopsgate *against* Alderman Beecher. Case 6.

THE CHURCHWARDENS of the parish of *Bishopsgate* made a tax for the relief of their poor for *a whole year*, which amounted to six hundred pounds and upwards, when they should have made only *a quarterly rate*; and the same, through inadyterency, was confirmed by *Alderman Beecher*, who was the alderman of that ward; and, afterwards, he, fearing that the churchwardens might collect the whole sum, and make some ill use of it, refused to grant a warrant to distrain for this tax.

The churchwardens thereupon moved the court of king's bench for a *mandamus* (a) to compel him to grant his warrant, and ob-
to be made for only *a quarter* of the

If a poor's rate for *a year*, when it should only have been for *a quarter*, be inadvertently confirmed, the Court, on a *mandamus* to the justice to grant a warrant to *levy* the same, will order the distress whole rate.

(a) That a *mandamus* lies in this case, see *Rex v. Montague*, 1. Sess. Cases, 367. *Rex v. Mayor of Worcester*, B. R. H. 120. *Rex v. Dean of Norwich*, Carth.

450. *Rex v. Justices of Somerset*, 2. Stra. 992. *St. Luke's v. Justices of Middlesex*, 1. Wils. 133.

THE CHURCH-WARDENS OF BISHOPSGATE **against** **ALDERMAN BEECHER.** obtained a rule of court for him to shew cause why a *mandamus* should not be granted (a).

THE ALDERMAN, at another day, by his Counsel, shewed all the matter before-mentioned for cause, &c.

And a rule was made, that he should grant his warrant to distrain for the tax for *one quarter* of a year, and no more, for he could not confirm this tax in part; it must be for the whole, or for no part (b).

(a) If the rate be illegal, the justices may refuse to sign it, and they may return it for cause upon a *mandamus* directed to them to sign it; but as to the sums or parties assessed, they have nothing to do with it, the remedy is by appeal; and though the *Aldermen of Dorchester* refused to sign a rate, because of inequality, yet

THE COURT granted a *mandamus*, and after a return *a peremptory mandamus*, and then an *attachment*, in order that the parties grieved might appeal. Cited by the Court in this case of *Beecher's*, 16. Vin. Abr. 429. pl. 5.—NOTE to former edition.

(b)

Case 7. The King *against* Journeymen-Taylors of Cambridge. Monday, 6 November 1721.

An indictment against a taylor, with the addition of yeoman, is good.

2. Inst. 603.

3. Hawk. P. C.

ch. 23. s. 14.

ONE *Wife*, and several other journeymen-taylors, of or in the town of Cambridge, were indicted for a conspiracy amongst themselves to raise their wages; and were found guilty.

IT WAS MOVED in arrest of judgment, upon several errors in the record,

FIRST, That the defendants, having the addition of "*yeomen*," are, notwithstanding, charged with a conspiracy not to work as "*journeymen taylor*," which is a repugnancy.

It was answered, that "*yeoman*" is a good addition, for a yeoman may be a taylor.

THE COURT held, that there was no inconsistency between the addition of "*yeoman*" and the addition of "*taylor*."

The caption of an indictment thus, "*At a general quarter sessions of the peace*," omitting "*of our lord the king*," is good; for it shall be intended the king's peace.

Dyer, 76.

1. Lev. 175.

2. Sid. 422.

4. Hawk. P. C.

ch. 25. s. 122.

3. Burr. 1503.

SECONDLY, The caption is not good, being "*ad general. quarter sess. pacis, &c.*" omitting "*domini regis*" after "*pacis*." This exception has been several times held fatal, and is very different from the cases where they are omitted after the words "*just. dist. domini regis ad pac. in com. præd. conservand. assign. (a).*" In *Hilary Term*, in the first year of *Queen Anne*, and in *Hilary Term* in the eleventh year of *Queen Anne*, two indictments were quashed for this exception.

It was answered, that this objection has been often over-ruled, for it must be intended the king's peace, and that the case in *Ventris (b)* has been denied for law.

THE COURT was of the same opinion, and said, that of late years this objection had never prevailed.

(a) 1. Sid. 175. Keb. 656. 885. Vent. 39.

(b)

Office of the Clerk of the Peace, 16.

THIRDLY,

THIRDLY, No crime appears upon the face of this indictment, for it only charges them with a conspiracy and refusal to work at so much *per diem*, whereas they are not obliged to work at all by the day, but by the year, by 5. Eliz. c. 4.

It was answered, that the refusal to work was not the crime, but the conspiracy to raise the wages.

THE COURT. The indictment, it is true, sets forth, that the defendants refused to work under the wages which they demanded; but although these might be more than is directed by the statute, yet it is not for the refusing to work; but for conspiring, that they are indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of *The Tailwomen v. The Brewers of London* (a).

A conspiracy among journeymen to refuse to work under certain wages is an indictable offence.
Post. 320.

1. Bl. Rep. 392.
2. Hawk. P. C. ch. 72. s. 2.

* [12]

FOURTHLY, That this fact being laid in the town of *Cambridge*, it did not appear by the record in what county *Cambridge* was, which it ought to do, because there are other towns of that name in *England*, viz. in *Gloucestershire*; and so it is a mis-trial: for there is no more reason to award the *venire* to the sheriff of *Cambridge* than of any other county. The *venire facias* is awarded to the sheriff of the county of *Cambridge*, commanding him to summon a jury "*de vicineto villæ Cant.*" In the margin of the indictment it is *villa de C.*; in the indictment the *venue* is alledged only *apud villam de C.*; and though the *certiorari* to remove it is directed "*Just. domini regis de villa C. in com. nostro C.*" this error is not helped by naming the county in the *certiorari* to remove the indictment, because that writ is only an order of this court. Neither shall it be intended that *Cambridge* is in the county of *Cambridge*, because this is a criminal case, and intendments are never allowed in prosecutions of this nature.

An indictment, laying the fact in the town of *Cambridge*, without stating in what county held go

Kely. 15.
1. Salk. 289.
Stra. 44.
1. Burr. 333.
4. Hawk. P. C. ch. 25. s. 83.

It was answered, that the fact being laid in the town of *Cambridge*, it shall be intended that the town is within the county of *Cambridge*, for which *Long's Case* (b) is an authority in point.

THE COURT. If a *venire facias* be directed to the sheriff of *Cambridge* to return a jury, and he returns one *de vicineto Cantabrigiæ*, it is good; for *Cambridge* being mentioned in several acts of parliament, the Court must take notice of such acts, and upon such a return will intend that *Cambridge* is in the county of *Cambridge*. In the case of *Withers v. Warner* (c), in *Hilary Term*, in the sixth year of *George the First*, we took judicial notice that "*London*" and "*the city of London*" are all one. The *certiorari* is directed, "To the justices of our lord the king of "*the town of Cambridge, in our county of Cambridge,*" and returned by the justices of the vill in the county of *Cambridge*; so that it will be a very foreign intendment to suppose the *vill* to be out of the county.

(a)
(b) 5. Co. 120.

(c) 1. Strange, 309.

An indictment **FIFTHLY**, This indictment ought to conclude *contra formam statuti*; for by the late statute 7. Geo. 1. c. 13. journeymen-tailors * are prohibited to enter into any contract or agreement for advancing their wages, &c. And the statute of 2. & 3. Edw. 6. c. 15. makes such persons criminal (a).

It was answered, that the omission in not concluding this indictment *contra formam statuti* is not material, because it is for a conspiracy, which is an offence at common law. It is true, the indictment sets forth, that the defendants refused to work under such rates, which were more than enjoined by the statute, for that is only two shillings a-day; but yet these words will not bring the offence, for which the defendants are indicted, to be within that statute, because it is not the denial to work except for more wages than is allowed by the statute, but it is for a conspiracy to raise their wages, for which these defendants are indicted. It is true, it does not appear by the record that the wages demanded were excessive; but that is not material, because it may be given in evidence.

Vent. 13.
Sid. 409.
omb. 371.
alk. 460.
oughl. 441.
Com. Dig.
Indictment
3. 6.).
larch, 124.
ro. Eliz. 108.
d. 342.
Hen. 6. 49.
3. pl. 17.
2v. 153.
Keb. Rep.
57.

THE COURT. This indictment need not conclude *contra formam statuti*, because it is for a conspiracy, which is an offence at common law.

So the judgment was confirmed by **THE WHOLE COURT** *quod capiantur*.

(a) 1. Saund. 250. Wm. Jones, 379.

Case 8. Sir Hans Sloane, President of the College of Physicians, *against* Lord William Pawlett (a).

Saturday, 25 November 1721.

TRESPASS for entering his house and taking a silver tankard. The defendant pleaded *not guilty*.

The special matter given in evidence was, a justification under a warrant from the lieutenancy of *Middlesex* to levy eight pounds by distress, &c. for not appearing, &c. being duly summoned, and for not finding a horse to serve in **THE MILITIA**.

This cause being at issue, and coming on to a trial before **PARKER, Chief Justice** (now **LORD CHANCELLOR**), he ordered it to be made a case, and to be referred to the opinion of the court of king's bench, which was accordingly done.

THE CASE was thus stated: *Lord William Pawlett* and others were deputy-lieutenants of the county of *Middlesex*, and, as such, were not exempted from this charge by a **CHARTER** exempting all the members thereof from "bearing or providing arms to serve in the militia in *London and Westminster*."

(a) This case was twice argued, and together. — **NOTE** to the former edition. — here both arguments are blended together.

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had power, by the statute 13 & 14. Car. c. 3. to call together persons, from time to time, and to arm and array them, as by the said statute is directed, and to charge him who has an estate of five hundred pounds a year in possession, or six thousand pounds in goods and money, with horse, horseman, and arms, and so proportionably. By the same statute power is given to the lord-lieutenants and their deputies to inflict a penalty not exceeding twenty pounds, upon those who are charged, &c. and who neglect to find a horse, &c. and to serve in person, or to provide others to serve in their places, which penalty is to be levied by warrant, by the distress and sale of goods, &c. : that the said deputy-lieutenants caused the plaintiff, *Sir Hans Sloane*, president of the *College of Physicians*, to be summoned to appear in person, or to find a horse and arms for his estate at *Cheisea* of five hundred pounds land in possession, which is within seven miles of *London*, for another to serve in the militia, &c. in his place, which he refused, insisting on a charter of exemption granted to the *College of Physicians* by *King Charles the Second*, dated the twenty-sixth day of *March*, in the fifteenth year of his reign, exempting "all members from bearing or providing arms to serve in THE MILITIA in *London* and *Westminster*, or the suburbs, or within seven miles thereof, and that every designation or appointment to the contrary shall be utterly void, &c." by which charter another is recited, which was granted to the said College by *King Henry the Eighth*, and another by *King James the First*, exempting them from several services. Thereupon the plaintiff, *Sir Hans Sloane*, was fined eight pounds, and a warrant was granted by *Lord Pawlett* to levy the same by distress and sale of the plaintiff's goods; and accordingly the officer, to whom the warrant was directed, entered the house, and distrained a silver tankard, for which the plaintiff brought this action of trespass, and the defendant justified, &c.

* [13]

Upon arguing this case three points were made.

THE FIRST was concerning the king's power to grant charters of exemption from the penalties or charges imposed on the subject by act of parliament.

THE SECOND was, Admitting the king had such a power, then whether there were sufficient words in this charter to make such an exemption.

THE THIRD was, Whether the justification under this warrant was good.

BAINES, for the plaintiff, argued,

FIRST, That the king has power, by his charter, to exempt any subject from the penalties of this statute seems very plain, because, before this statute was made, the power of THE MILITIA was in the king, and it was originally so at common law; and this statute was made to ease the crown of a labour, and to put things in an ordinary form, but not to deprive the king of that power which he had before. And as a parallel case, the king may exempt any subject from

See Dyer, 52.
211.
Plow. Com. 226.
501.
6. Rep. 7.
7. Rep. 63.
Cro. Car. 428.
Vaugh. 381.
3. Lev. 392.

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the payment of taxes imposed by act of parliament; as for instance, he might exempt him from payment of *tenths* and *fifteenths*: and though it may be objected that a charter of exemption of all men in general from the penalties of the militia act would be totally to elude the act itself, yet it will not follow from thence, that a particular charter of exemption of a corporate number of men will not be good; for the first is but merely possible, and a thing which no king in his right senses would do; but the second is frequently done. It is true, this exemption may be said to do an injury to others, by laying a heavier charge on their lands, but it is more properly a charge on the person in respect of his lands, and therefore it is a good exemption. Now admitting that the power of THE MILITIA was entirely in the crown before the making this statute, as certainly it was, and so declared to be by the statute 13. Car. 2. c. 6. (a), it is as certain, that the king might exempt any of his subjects * from serving in it; and if so, then the statute has made no alteration of his power. The old commissions of array (b), on which this of the lieutenancy is founded, were to array all those who were able to serve, and that those who were not able to serve in person should contribute to those who were; yet the king might exempt any of his subjects, unless in cases of apparent danger, from this service. Tenants by knight-service were the first militia of this kingdom, it being a tenure instituted for the defence thereof; for those tenants, as my LORD COKE tells us (c), were always to be armed for that service, yet the king could exempt any of them from attending, unless it was where the danger was apparent, as to suppress a rebellion, or to repel an invasion; in which cases none could be exempted. So the king might exempt particular persons from being jurymen, unless in a writ of right (d). It is true, he cannot exempt a knight from being of the jury, where a peer is concerned in the trial as a party; and the reason is, because by such an exemption there would be a failure of justice; and the subject hath a greater interest in juries than he hath in THE MILITIA (e). Now as to this statute itself, it shews that the parliament did not intend by any implication to devert the king of any right or prerogative which he had before it was made; for the clause which concerns this matter is, "that the king may, from time to time, issue out commissions of lieutenancy, and that the lieutenants may array persons, and form them into companies, and conduct and employ them within such places for which they shall be commissioned, &c. as the king shall direct;" which last words shew, that THE MILITIA is still to be under his direction; and the beginning of this clause is, "that he may issue out commissions for the several counties,

(a) Repealed by 2. Geo. 3. c. 20.

(b) Their form was settled in parliament anno 5. Hen. 4. Cotton's Abridgment, 428. Rushworth's Collection, 68. They continued in use till the end of Queen Elizabeth's time, when commissions of

lieutenancy were issued. 4. Hen. 6. pl. 6. 21. Edw. 4. pl. 56. Vaugh. 349. Lambert, 135. a. Wilkins's Saxon Laws, 217.

(c) Co. Lit. 63. 72. 76. 4. Inst. 492.

(d)

(e) See 24. Geo. 2. c. 18. Post. 17. notis.

" cities,

"cities, and places of *England* and *Wales*, &c." but there is no time limited when ; so that he is not obliged to issue them out every year, nor for all the counties, for he may do it for one county, and no more ; and if in one county, he may exempt some persons there from this service, for there are no express words in this statute to devest the king of such power ; and it is certain, that in the most minute cases of the king's prerogative it cannot be taken away by any general words in an act of parliament (a). Now the power which the lieutenants have by this statute is only a bare authority "to arm, array, and form persons into companies, &c. ;" and as this power is given to * them by commission from the king, so he may suspend that power *ad libitum* ; and it is certainly suspended by this charter granted to THE COLLEGE OF PHYSICIANS, because it exempts them from "all powers in the said act," which must be from the actual service in THE MILITIA in person, and from providing another to serve in their place, the one being the primary, and the other the secondary service. Besides, this statute was made to relieve, and not to charge the subjects ; and it is absolutely necessary that a power of exempting persons should be lodged somewhere ; it is daily done by the lieutenants themselves ; and it is done by virtue of their commission ; and if they may exempt, and not the king, this absurdity would follow, *viz.* that the derivative power is greater than the power from whence it is derived. If the king should be included within the general words of this act, yet in this charter there is a special *non obstante* of any law or statute to the contrary ; and when an act expressly declares that the king's grant shall be void, though there be a clause *non obstante* in the patent, yet the king may dispense with such an act, if there be in the patent a clause *non obstante* of that statute (b). But there are many instances of the king's power of exemption, *viz.* the province of *Cahterbury* granted the tenths, &c. to the king, and appointed a certain person to collect them (c) ; and the convocation ordered, that no privileged person should be exempted from being a collector, yet one who had a charter of exemption from the king was adjudged, by virtue thereof, to be exempted. The subsidy bills (d) take notice, that no letters patent of exemption shall be taken to excuse or exempt any person from the taxes, or from the charge of any sum appointed to be paid by those acts ; and that all *non obstante's* in bar of any act of parliament for the supply or the assistance of the king are declared to be void. Now since the Legislature thought it proper to mention such powers of exemption, and to prohibit the effects thereof, this seems to prove that such powers would have remained in the king, if they had not been prohibited to be put in execution ;

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(a) 11. Rep. 74. Hob. 146. Moor, 542. 3. Lev. 382. Cro. Car. 428. Plowd. Com. 236. 501. Vaughan, 351. Co Lit. 99. a. Dy 269. a. b.

(b)

(c) Bro. "Exempt." pl. 9. 14. Bro. "Patent," pl. 16. Dyer, 52. 269.

2 Rich. 3. pl. 12. 2 Hen. 7. 6. 7. Co. 14. 36, 37. 12. Co. 18. Hob. 214. Plowd. Com. 457. 501. a. b. Hardr. 443. Vaugh. 330. Sid. 6, 7. Vaugh. 349.

(d) 22. Car. 2. c. 3. 6. & 7. Will. 3. c. 18. 7. & 8. Will. 3. c. 18.

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though it does not seem absolutely necessary to mention those powers in these acts, because the subsidies were given to the crown for particular uses mentioned in the acts themselves; so that if such patents of exemption had not been named in those statutes, the king could not have discharged any man from the payment of those subsidies (*a*), because they must be applied to those uses for which they were given. As to this charter granted to THE COLLEGE OF PHYSICIANS, it has been allowed and acquiesced under ever since it was first granted to this very time, which is a strong presumption that it is good; and the statute 1. Geo. 1. c. 3. which takes notice that such people who are exempted from serving in THE MILITIA shall not be included in that act, is a strong proof that some are exempt. * Neither is any particular person damaged by this exemption, but all people alike, for it imposes no new charge on them, but lessens the old charge as to some particular persons exempted; neither is it any manner of charge on the lands, for the statute requires a personal appearance of the people armed to defend the kingdom, and that when they appear, a computation may be made of what shall be sufficient to furnish them to serve in THE MILITIA. A

SECONDLY, The next point is, Whether there are sufficient words in this charter to exempt the physicians from finding horse and arms, as well as from their personal service in THE MILITIA; and as to that matter it is to be observed, that the charter recites the statutes of *Henry the Eighth* and *James the First*, and that the regulations therein wanted some new exemptions; and therefore it exempts the physicians from "watch and ward," and from "serving on juries, or bearing or providing arms to serve in THE MILITIA." It is certain, that no man is bound to bear arms for another; he may do it voluntarily, or by an agreement, but not otherwise; and if the word "bearing" is sufficient to exempt a man from the personal service, the word "providing" must be nugatory, if it do not exempt him from being contributory to the finding arms; and such a construction would make this charter of no effect.

THIRDLY, The next thing to be considered is, Whether the defendant can justify under this warrant, it being to distrain for a penalty imposed for not bearing or finding arms to serve in the militia. Now this is offered by the defendant as one entire cause of justification, and as such it must be good for the whole; for if one part be good and the other bad, then the whole will be naught; and as to that matter, one part is not good, and therefore an entire penalty as to both can never be imposed (*b*); for if it should, then certainly the punishment would be against law as to that part which is not good. Now one of the causes for which this penalty was imposed is naught, *viz.* "for not

(a) 3. Mod. 96.

(b) Cro. Eliz. 434. 11. Co. 42. 1. Saund. 27.

"bearing

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“bearing arms,” when by the statute no man is bound to bear arms, if he find another to serve in his place (a).

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ON THE OTHER SIDE *it was argued (b)*, that the power which the king had to exempt the subject from the payment of the *tenths* and *fiftieths* granted to him by act of parliament does not come up to this case, because the king had an entire interest vested in him as to those things. So where the province of *Canterbury* granted the tenths to the crown, and appointed one to collect them, and the convocation * ordered that no privileged person should be exempted from being a collector, yet one who had a charter of exemption from the king was excused; this likewise does not concern the case now in question, because the convocation had not power to make any man the king's purveyor; and THE BILL OF RIGHTS, in the third year of *Charles the First*, entirely condemns all those exemptions. It has been admitted on the other side, that the king could not grant these charters of exemption in extraordinary cases; and that he cannot exempt a knight from being a juryman where a peer is a party in the cause (c); and certainly it cannot be pretended that this can be so much for the good of the publick as the defence of the kingdom by THE MILITIA; and there is a great difference between exemptions and excusing persons at discretion. It is true, the king may exempt men from *portage* or *murage*, because such exemption may be lawfully made in opposition to the authority of those who take upon themselves to build bridges, &c. but the king cannot exempt them from being contributory towards the support of old bridges, because they were subject to such contribution prior to any exemption (d); so in the principal case the charge was vested prior to the charter of exemption, and for that reason it cannot be good. There is likewise another reason why it cannot be good, and that is, because it is to exempt men from that charge which the law has provided for the public safety of the kingdom, in which every man hath a benefit; and therefore it is reasonable that every man should be contributory to it.

(a) The remainder of the argument for the plaintiff was what SERJEANT PENGELLEY said in Hilary Term 1; 22. PENGELLEY divided the case into three points: 1st, What power the king had in the militia antecedent to the acts of 13. Car. 2. c. 6. and 13. & 14. Car. 2. c. 3. 2dly, What alteration had been made by those acts. 3dly, Whether the words of exemption in the charter are sufficient.—NOTE to former edition.

(b) By REEVES first, then by WEARG. And what is here reported to be spoken to the first and third points for the defendant was said upon the last argument. REEVES as to the first point: The prerogative of the king relating to dispensations has of late years been disallowed; and it is expressly declared by THE BILL OF RIGHTS, 1. & 2. Will. & Mary, c. 2. that such dis-

persations are void. No power of exemption is reserved to the king by 13. & 14. Car. 2. c. 3. *Goodwin v. Hals*, which allowed a dispensation of the Test Act, and many other cases, have of late years been denied for law. However, if this charter were a good exemption in point of law, yet it was only so during the life of the king who granted it, but will not bind his successors.—NOTE to former edition.

(c) By 24 Geo. 2. c. 18. “No challenge shall be taken by a peer or lord of parliament to any panel of jurors, for want of a knight being returned in such panel, nor any array quashed by reason of any such challenge taken after that time.”—See 4. Hawk. P. C. ch 43 s. 4.

(d) P. powd. 487. 12. Co. 29. W. Jones, 106. 286.

SIR HANS
SLOANE,
PRESIDENT OF
THE COLLEGE
OF
PHYSICIANS,
against
LORD
WILLIAM
PAWLETT.

* [18]

As to THE SECOND POINT ; that the words of this charter exempt the physicians from " bearing or providing arms to serve in " THE MILITIA," which seems to be only a personal discharge, and that (shall be intended by the word " bearing," and from furnishing himself with arms by the word " providing ;" but he is not discharged from being contributory to find arms for another to serve in THE MILITIA. Besides, the king's charter cannot exempt a man from a thing which concerns the whole right of the subjects (a), as this statute does, for it is for the public safety of all men. It is true, he may exempt men from any thing which concerns his private right, or which is a branch of his prerogative, or wherein he himself is principally concerned ; but it does not follow, that because he may grant such exemptions, therefore he may exempt where the whole community are concerned. * Now this statute does not bind any man to a personal service in THE MILITIA, nor is it a charge on the person, but only in respect of his lands ; therefore where a man is protected in the possession and quiet enjoyment of his lands, he ought in reason, as well as in law, to be contributory to the charge of such protection.

THE LAST OBJECTION was to the warrant, viz. that the defendant could not justify under this warrant, &c. ; but it was argued, that the warrant was good to levy the penalty for not " bearing or providing arms." It had been otherwise if it had been for not " serving or finding one to serve in THE MILITIA," because he who serves is not to contribute to the finding another to serve ; but by the warrant the penalty was to be levied for not appearing, being duly summoned, as well as for not " bearing " or providing arms to serve ;" so that upon the whole matter, this is a good warrant, and by consequence a good justification under it.

BAINES *in reply*. The bill of rights declares only such dispensations shall be void, which plainly proves a precedent right in the crown to grant dispensations ; and that act does not take away any right the king had of granting dispensations, but in such cases only where a *non obstante* was necessary to be in the charter. And in many cases the king may grant dispensations without a *non obstante*.

THE COURT upon this first argument declared this to be a cause of great difficulty and consequence, as concerning the prerogative of the king, and the general right of the subject ; and for that reason it ought not to be determined upon a *case stated*, because upon such a proceeding the judgment of the Court would be final, and not to be avoided by the party who should think himself aggrieved, either by writ of error or appeal.

THE COURT, therefore, proposed, that both parties should consent to make it a *special verdict*, and that it might be argued once more before judgment was given ; upon which a writ of error

might be brought in parliament by either side against the judgment, and there to be finally determined.

SIR HANS
SLOANE,
PRESIDENT OF
THE COLLEGE
OF
PHYSICIANS,
against
LORD
WILLIAM
PAWLETT.

THE CHIEF JUSTICE, however, upon this first argument, was of opinion, that the king by his prerogative could not dispense with an act of parliament which was made for the public good of the whole nation. But the question in this case was, whether this statute had de vested the king of any part of his prerogative, or whether it was made to ease him of the care of arraying THE MILITIA, and entrusting the lieutenants and other officers therewith; for if it was, then it did not de vest him of any authority he had before the act. Now he was of opinion, that this charter did not exempt the physicians from being contributory to the finding men to serve in THE MILITIA, though probably it might exempt them from any personal appearance upon a summons duly served. But admitting that he might exempt them * from personal duties, yet it cannot be inferred from thence, that he might exempt them from being contributory to others to perform those duties which are required by an act of parliament, especially where the subject has an interest that such duties should be performed, or a loss if they should not; and the better opinion seemed to be, that the king could not exempt in such cases. That in the principal case, the contribution to be made to the finding a man with arms to serve in THE MILITIA is a charge upon the lands as well as on the persons of the owners; and if this charter of exemption should be good, it would encrease the charge on all the lands of persons not exempted, which would be a very great damage to such persons, because the physicians who are exempted are a considerable body of men in every county; for which reason it would be very hard if the king had power to lessen the tax imposed upon one man, and charge it upon another. Besides, the king cannot exempt in any case where the subject has an interest; as where particular persons are bound by prescription or tenure to repair bridges, the king cannot exempt them from repairing, because all the subjects have a common benefit to pass and repairs over public bridges.

* [19]

It was adjourned for a further argument (a).

(a) It does not appear in any of the Reports, that this case was ever moved again.—See Rex v. John Tubbs, Cowp. 512.

The King *against* Hutchinson, Mayor and Aldermen of Carlisle. Case 9.

MANDAMUS to the mayor and common-council of the borough of *Carlisle*, to restore *John Symfson* to the office of a capital burgess of the said borough, &c. If the burges of a corporation give his vote

for the election of a mayor, the corporation, on his being summoned to answer this charge and refusing to appear, may *disfranchise* him, although he had not been convicted of the offence at common law.—S. C. post. 99. S. C. Fort. 203. 9. Co. 99. Carth. 173. Ld. Ray. 1283. 1. Stra. 557. 1. Burr. 339. 2. Burr. 723. 4. Burr. 1999. Esp. Digest, 677.

THE KING *against* **HUTCHINSON,**
MAYOR AND
ALDERMEN OF
CARLISLE. They return the charter of incorporation, with a power to the mayor and aldermen to remove any capital burgesses for any *misdemeanor*, and then set forth an motion by them for *bribery* at an election, &c. for mayor of the corporation.

Two points were made in this case.

FIRST, Whether the offence for which he is removed be *indictable* at common law.

SECONDLY, Whether, if it be so, the corporation, who have expressly a power to remove, can make such removal without a precedent conviction.

THE COUNSEL for *Sympton* insisted, that this was not a sufficient cause to remove him, in cause *bribery* is a crime punishable at common law; and it is against MAGNA CHARTA to remove him from his freedom before he is convicted of the crime. If the law should be otherwise, what security can any man have against the insults of power: but it is plain, and so it was adjudged in *James Baggs' Case* (a), that a freeman shall not be disfranchised, unless it be by charter or prescription, if he be not convicted in due form of law. And where he may be disfranchised by * charter or prescription, and without conviction, it must be for an act against his duty and oath relating to his office, or not doing his office; as a justice of peace not attending the sessions, or where a judicial officer is a common drunkard, or for any other misdemeanor merely against the duty of his office, and which is no crime at common law; for there is a difference between the doing an unlawful act, and the not doing his duty relating to his office, the one being a crime, and the other only a contempt.

PRATT, *Chief Justice*, and POWYS, *Justice*, held, that there ought to have been a previous conviction.

BUT EYRE, *Justice*, and FORTESCUE, *Justice*, held, that this offence being plainly against his duty and oath of burgess, the corporation might remove him without conviction.

And THEY ALL AGREED, that a burgess may be removed for an offence for which no indictment will lie.

PRATT, *Chief Justice*. If a burgess be convicted upon an indictment for an offence at common law, this Court may order, as part of the punishment, that he be disfranchised,

EYRE and FORTESCUE, *Justices*, denied it.

Adjournatur (b).

(a) 11. Co. 93.

(b) The whole Court were of opinion, that this was a good return without any conviction at law; though he might have been first convicted at law; for though it be an offence indictable at common law,

yet being also a great offence against the duty of his office, the corporation have a jurisdiction, there being an express power in the charter to remove. S. C. Fort. 200.—See also S. C. post. 99.

Lord Coningsby's Case.

Case 10.

LORD CONINGSBY brought an ejectment against some of his tenants, and moved for a trial at bar.

The defendants, by their Counsel, thereupon moved, that * the plaintiff being A PEER OF THE REALM, and consequently not to be attached if the verdict should be against him, might be obliged to make some responsible person to be his lessee, or otherwise that he would waive his privilege.

But THE COURT rejected the motion; for if the plaintiff was not worth anything, he could not be obliged to do so; and it would be unreasonable that his peerage should be a loss to him, since every subject has a right by birth to sue in the king's courts, where no distinction is to be made of persons (a).

On granting a trial at bar in ejectment by a peer, the Court will not oblige him to give security for costs, or waive his privilege.

S. C. 1 Stra. 548.
10. Mod. 383.
Ld. Ray. 697.
4. Mod. 379.
1. Stra. 681.
Hullock on
Cotts, 445.

(a) But see Smith v. Parks, 10. Mod. 383.

* [22]

* Mr. Lister's Case.

Case 11.

17 November 1721.

MR. LISTER was married to *Lady Rawlinson*, a widow, who had, before her marriage with *Lister*, settled her estate in her own power, and out of his controul. Afterwards, there being some disagreement between them, he, by a proper writing duly executed, covenanted to allow her so much every year for her maintenance, and that she might live separately from him; to which she agreed. They accordingly lived apart for some time. The husband, during this separation, pretending a desire to be reconciled to his wife, but in fact only wanting more money of her, she refused; whereupon he, with another person who assisted him, forced her into a coach as she was coming from church on a *Sunday*, and carried her into THE MINT, and kept her in custody under a strict confinement.

If a husband and wife agree to live separate, and during this agreement the husband take her violently into his custody, the Court, on *habeas corpus*, will set her free.
S. C. Stra. 478.
Chan. Prec. 496.
pl 309.
Gilb. Rep. 152.
Bur. Rep. 542.
S. P. accord.
1. Term Rep. 5.

* And now she being brought into court by *habeas corpus*, her husband moved by his Counsel, that the Court would not interpose between husband and wife; that she could not deny herself to be his wife; and that by law the husband has a coercive power over the wife.

THE COURT. An agreement between husband and wife to live separate, and that she shall have a separate maintenance, shall bind them both until they both agree to cohabit again (a); and if the wife be willing to return to her husband, no Court will interpose or obstruct her. But as to the coercive power which the husband has over his wife, it is not a power to confine her; for by THE LAW OF ENGLAND she is intitled to all reasonable liberty, if her

(a) See Corbet v. Polnitz, 1. Term Rep. 5.

behaviour

MR. LISTER'S CASE. behaviour is not very bad ; and therefore she shall now be set at liberty, if it is her pleasure so to be.

She answered, that she desired to be at liberty.

And thereupon she was discharged out of the custody of her husband, and went out of court with her son.

BUT THE COURT said, that the husband should have leave to write to her, and to use any lawful means in order to a reconciliation, provided she was willing to see him ; and that her children or servants should not hinder him, unless by her order ; but that whenever she permitted him to come to her, he should not offer any violence or uncivil behaviour to her person (a).

(1) Rex v. Mary Mead, 1. Burr. 542. in point. — See also Guth v. Guth, 3. Bro. Chan. Cases, 614.

* [23]

Case 12.

* Smith against Trigg.

Tuesday, 28 November 1721.

If a mother devise a copyhold estate in fee to her daughter and heiress, but die without surrendering it to the use of her will, yet the daughter shall take the estate by descent.

S. C. 1. Stra.
487. 489.

THIS was a case referred out of the court of chancery for the opinion of this court.

The point was, Whether one *Jane Day* took the lands in question, either by purchase or by descent.

The case made for the opinion of the Court on a trial at *nisi prius* before PARKER, Chief Justice, was thus :

Hugh Hunt being seised in fee of the premises in question married *Jane*, the widow and relict of *John Trigg*, the lessor of the plaintiff's great uncle. After the marriage, *Hugh Hunt* surrendered the premises to the use of his will, and devised the same to *Jane* his wife and her heirs, and died without issue by her. After the death of *Hugh Hunt*, *Jane* was admitted, and likewise surrendered to the use of her will, and devised the same to *Jane Day*, her daughter and heir by her first husband *John Trigg*, and to her heirs for ever, and so on after died. *Jane Day* before admittance made her will, and thereby gave the premises to the defendant in the words following :
“ ITEM, I give and bequeath all my freehold and also all my copyhold estate, which I intend to surrender to the use of this my will, lying in *Edmonton*, in the county of *Middlesex*, to my cousin *Thomas Trigg* (the defendant) for and during the term of his natural life, with remainder over.” After making the will, and before any court day, *Jane* the devisor died, having never surrendered to the use of her will. But the defendant, who was the devisee, was notwithstanding admitted under the devise.

And IT WAS RESOLVED, that *Jane* was in by descent, because she was heir at law to the testatrix ; and that where two rights meet together in one person (as they did in this case), the one being by devise, and the other by descent as heir at law, the descent is the most noble means to come to an estate, and therefore the law judges,

Michaelmas Term, 8. Geo. 1. In B. R.

adjudges, that the best title shall stand. So where *a feoffment* is made to several uses, the reversion in fee to the heirs of the feoffor, in such case the heir shall take the reversion by descent, because it was part of the old estate of the feoffor; for so much of the use of the lands which he did not dispose of by the feoffment still remained in him as part of the old estate (*a*). But in the case of *a will*, if a man devise any other estate to the heir at law than what he was to take by descent; as for instance, if the testator devise a less estate to him, or an estate in fee to arise upon a condition, there it is otherwise.

SMITH
against
TRIGG.

(*a*) Co. Lit. 22. b. 27. 2.

HILARY TERM,

The Eighth of George the First,

IN

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Littleton Powis, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

[24]

• Button *against* Heyward and his Wife. •

Case 13.

THE PLAINTIFF brought an action on the case against the defendants for slanderous words spoken by the wife, viz. "George Button" (the plaintiff) "is the man who killed my husband," her first husband being dead; and a verdict was given for the plaintiff.

To say of a certain person, "that is the man who killed my husband," is actionable.

IT WAS MOVED *in arrest of judgment,*

1. Viner, 507.
2. Bar. K. B. 84.
1. Roll. Abr. 71, 72.
1. Vent. 117.
Cro. Eliz. 823.
1. And. 120.
2. Stra. 1130.
Cowp. 276.

FIRST, That these words are not actionable, for the uncertainty of the word "killing;" for it might be justifiable, or in his own defence, or *per infortunium*, and shall not be presumed felonious, and so made actionable by intendment; for it is a maxim, that words shall be taken *in mitiori sensu* (a).

SECONDLY, The "*ad tunc defuncti*" in the declaration refers to the time of the declaration, not to the time of speaking the words (b).

(a) Moor, 573. Cro. Jac. 215. 306.
331. Hob. 6. 77. 177. Cro. Jac. 315.
4. Co. 20. Roll. Abr. 72. 77. 2. Salk.
694. 696.

(b) Hob. 6. Cro. Jac. 331.

THIRDLY,

BUTTON
against
HEYWARD
AND HIS WIFE.

THIRDLY, The words in the last count, "I know the man that killed my husband, it was *George Button*," are spoke of a past time, perhaps several years ago; and so not actionable (a).

WYNDHAM *contra*.

FIRST, The words in themselves import a voluntary and unlawful killing by necessary inference; and in the later reports have always been held actionable (b).

SECONDLY, There is no necessity to aver the death of her husband, for the words imply it (c).

PRATT, *Chief Justice*. There can be no question but, at this day, these words are actionable. In former times words were construed *in mitiori sensu* to avoid vexatious actions, which were then very frequent; but now *distinguenda sunt tempora*, and we ought to expound words according to their general significations to prevent scandals, which are at present too frequent. The words themselves ascertain the death of the person (d); and therefore there can be no necessity for any averment. We are to understand words in the same sense as the hearers understood them; but when words stand indifferent, and are equally liable to two distinct interpretations, we ought to construe them *in mitiori sensu*; but we will never make any exposition against the plain natural import of the words: the word "killing" signifies a voluntary and unlawful killing, and is actionable. There are a great many very odd cases in the Books.

POWYS, *Justice*, was of the same opinion.

EYRE, *Justice*. The words are to be taken in their worst sense, for a malicious and felonious killing. The word "killing" of late years has been held actionable.

EYRE, *Justice*. AS TO THE SECOND QUESTION; whether any averment of the husband's death is necessary; the defendant's words have ascertained the death. In the time of king *James the First* this exception prevailed, but never of late (e). In the case of *Jacob v. Miles* (f), "*ad tunc defunct*" was held insufficient, because it referred to the time of declaration; but that point has been often over-ruled. In that case it was also resolved, that where the jury gave several damages for the words spoken at several times, and the judgment was entire for the damages and costs, the Court might reverse the judgment *quoad* the damages given for the words not

(a) Roll. Abr. 48. Vent. 50. W. Jones, 48. and the case of *Wills v. Wills*, Trinity Term the 7. Geo. 1.—See also *Carlsake v. Mappledoram*, that charging a person with *having had* a contagious distemper is not actionable, because it refers to a time past. 2. Term Rep. 473.

(b) Cro. Eliz. 49. 823. Cro. Jac.

166. Lev. 277. 4. Co. 15. 2. Lev. 150. Salk. 695. 697.

(c) Cro. Eliz. 317. Cro. Car. 489.

(d) See *Peake v. Oldham*, Cowp. 276.

(e) Sid. 51.

(f) Cro. Jac. 343.

actionable, and affirm it for the rest, and all the costs; which resolution has since been denied for law, for that the judgment must be reversed or affirmed *in toto*: so the case is of no great authority in any respect.

BUTTON
against
HEYWARD
AND HIS WIFE.

FORTESCUE, *Justice*. The rule of construction in actions for words is very different from what it formerly used to be. The maxim for expounding words *in mitiori sensu* has for a great while been exploded, near fifty or sixty years (*a*); whenever words are disreputable they are actionable. It was the rule of HOLT, *Chief Justice*, to make words actionable whenever they found to the disreputation of the person of whom they were spoken; and this was also HALE'S and TWISDEN'S rule; and I think it a very good rule. If the killing was justifiable, why did not the defendant justify the speaking the words? In the case of *Baker v. Pearce* (*b*) it was held, that words are to be taken *in malam partem*.

SECONDLY, An averment is not necessary (*c*). The Court will intend the party dead, unless it appears upon the record that he was alive.

BY THE COURT, Judgment for the plaintiff.

- .. (*a*) Skin. 364. Fortesc. 207. 10. Mod. 197. Gilbert Cases, 117. 236. 1. Vin. Abr. 500. pl. 1. 507. pl. 40. (*b*) 2. Salk. 695. 2. Ld. Ray. 959. 6. Mod. 23. (*c*) Vent. 117.

* [25]

* Spiller and his Wife against Adams.

Case 14.

THE PLAINTIFF brought a writ of dower against the defendant, who was then an infant, and admitted *ad prosequendum* by his next friend, and pleaded *uncore pris*; and judgment being given for the plaintiff in the common pleas, Adams brought a writ of error in the court of king's bench, and assigned the matters following for error.

FIRST, That the admittance *ad prosequendum* by *prochein amy* was wrong, for it should be *ad defendendum per guardianum*.

* To which it was answered, and so RESOLVED BY THE COURT, that true it is, an infant often prosecutes by his next friend; but yet an admittance *ad prosequendum* is good, even where he is defendant; for it is to prosecute his plea by which he defends himself against the plaintiff.

SECONDLY, It was objected, that damages were given to the defendant, which ought not to be done, because he pleaded *uncore pris*, which is no plea in dower, unless an actual assignment was made.

To which it was answered, AND SO RULED, that damages in this case were well given, though the defendant had pleaded *uncore pris*, because damages may be given *occasione detentionis dotis*.

THIRDLY,

dower, there
all be judg-
nt to recover
value, and
gages.

1. Rep. 117.
aft. Ent. 399.
1. Jac. 140.
alk. 108.
Com. Dig.
Pleader"
1. Y. 19. 1.
1. Inst. 37.
yer, 378.
rownl. 217.
Cro. 640.
id. 446.
Vent. 73.
utw. 719.
Saund. 94.

THIRDLY, It was objected, that though damages might be given in this case, yet it ought not to be upon the judgment *quod recuperet dotem*, this being in a real action; for before the *statute of Gloucester* (a) no damages were allowed in a real action; therefore the damages ought to be given from the time of the *disseisin* until after the writ of enquiry returned by the sheriff, if there was no wilful delay by the demandant.

To which it was answered, AND SO RESOLVED, that by the *statute of Merton* (b) the widow in a writ of dower shall recover the value of her dower in damages from the death of her husband to the day that she recovers the dower itself; that is, "*usque diem quâ ipsa recuperaverit per judicium Curie seisinam suam*," which, by intendment of law, is the day on which she had judgment *quod recuperet dotem*, for from that day she is accounted in the possession or seisin of her dower.

So the judgment was affirmed.

(a) 6. Edw. 1. c. 1.

(b) 20. Hen. 3. c. 1.

* [26]

Case 15.

* Read against Marshall.

Trespass on two
counts on differ-
ent days for
taking a hus-
band's goods,
and beating his
wife, is good,
though entire
damages are
given.

S. C. post. 342.
S. C. Fortesc. 377.

TRESPASS on two counts. The first was, for breaking the plaintiff's house, and taking his goods. The second was laid on a different day for beating his wife, *et ad tunc et ibidem bona et catalla ipsius querentes cepit et asportavit*. Judgment by default; and on writ of enquiry entire damages were given.

BELFIELD, Serjeant, moved in arrest of judgment, Because no damages ought to have been recovered for beating the wife, since she is no party to the action, nor has the plaintiff laid any special damage, as *per quod consortium amisit*, &c. to entitle him solely to this action. If these damages should be recovered, there may be two recoveries for one assault, for this action would be no bar to any action to be brought by the husband and wife jointly.

CHAPPER contra. The assault of the wife is only laid as aggravation of the damages, and not as a distinct trespass (a).

THE COURT inclined to think that this declaration was good. But *advizare vult* (b).

(a) See *Russell and his Wife v. Corne*, 1. Salk. 119. 2. Salk. 640. S. C. 6. Mod. 127. S. C. 2. Lord Ray. 1031. *Ted and his Wife v. Redford*, 11. Mod. 264. *James Osborne's Case*, 10. Co. 120. *Tomlinson v. Hie and his Wife*,

Cro. Jac. 664. *Dix v. Brooks*, 1. Stra. 61. S. C. Fort. 378.

(b) It is said, S. C. Fort. 377. that the Court held the declaration good, although the wife was not joined.

The King *against* The Marquis of Powis (a).

Case 16.

UPON A WRIT OF ERROR to reverse an outlawry for HIGH TREASON,

In outlawry for high treason, if the *capias* be to another county than that in which the defendant is described to live, it is an error in fact.

The error assigned was, that the process of outlawry against the marquis was directed to the sheriff of London, when he, the marquis, lived in the parish of St. Giles, in the county of Middlesex; which is an error in fact; for the process of *capias* must be always directed to the sheriff of the county where the party lives.

And for this reason the outlawry was reversed, upon the confession of THE ATTORNEY GENERAL.

S. P. C. 68.
2 Hale, 196.
4. Hawk. P. C. ch. 27. s. 116 to 128.

N. B. There were several exceptions in point of law taken to the record in this Term.

(a) This case came before the Court on Wednesday, the 11 April, 1722; but it was first argued in Hilary Term, in the seventh year of George the First, and finally

determined in Micholmas Term, in the ninth year of George the First.—NOTE to the former edition.

* [27]

* The King *against* The Dean and Chapter of Trinity-Chapel, in Dublin.

Case 17.

THE DEAN AND CHAPTER of Trinity-Chapel, in Dublin, denying Dr. T. S. the archdeacon of, &c. his seat therein, and his voice in the chapter, he brought a *mandamus* in the court of king's bench in Ireland, directed to them, suggesting, that his predecessors, time out of mind, had enjoyed the said liberty, and that the franchises and liberties of their corporate body were confirmed by letters patent of Henry the Eighth, &c.

A dean and chapter who have power to make bye-laws cannot make a bye-law that an archdeacon shall take the oath of canonical obedience before he is admitted into his office.

THE DEAN AND CHAPTER made a return to the effect following, viz. That by the same letters patent they had power to make bye-laws for the benefit of their corporate body; and that they made a bye-law on such a day, &c. that no person should be admitted a member of their body, unless he had taken the oaths of canonical obedience, and to keep the secrets of the said chapter, which the archdeacon denied to take; and thereupon they refused to admit him.

2. Roll. Rep. 490.
6. Com. Dig. 6. Serjeant's (B.).

This return was adjudged insufficient in the court of king's bench in Ireland; whereupon they granted a *peremptory mandamus*, and then the dean and chapter brought a writ of error in the king's bench here.

IT WAS ARGUED in their behalf, that the cause of denial, as returned by them, was a good and sufficient cause; and that a *mandamus* was not the proper remedy for the archdeacon in this case.

In dower, there shall be judgment to recover the value, and damages.

10. Rep. 117.
Rast. Ent. 399.
Cro. Jac. 140.

Salk. 108.
5. Com. Dig.
"Pleader"

(2. Y. 19.)
See 1. Inst. 37.
Dyer, 378.
Brownl. 217.
2. Cro. 640.
Sid. 446.
1. Vent. 73.
Letw. 719.
2. Saurd. 94.

THIRDLY, It was objected, that though damages might be given in this case, yet it ought not to be upon the judgment *quod recuperet dotem*, this being in a real action; for before the *statute of Gloucester* (a) no damages were allowed in a real action; therefore the damages ought to be given from the time of the *disseisin* until after the writ of enquiry returned by the sheriff, if there was no wilful delay by the demandant.

To which it was answered, AND SO RESOLVED, that by the *statute of Merton* (b) the widow in a writ of dower shall recover the value of her dower in damages from the death of her husband to the day that she recovers the dower itself; that is, "*usque diem quâ ipsa recuperaverit per judicium Curie seisinam suam*," which, by intendment of law, is the day on which she had judgment *quod recuperet dotem*, for from that day she is accounted in the possession or seisin of her dower.

So the judgment was affirmed.

(a) 6. Ed.v. 1. c. 1.

(b) 20. Hen. 3. c. 1.

* [26]

Case 15.

* Read against Marshall.

Trespass on two counts on different days for taking a husband's goods, and beating his wife, is good, though entire damages are given.

S. C. post. 342.
S. C. Fortesc. 377.

TRESPASS on two counts. The first was, for breaking the plaintiff's house, and taking his goods. The second was laid on a different day for beating his wife, *et adtunc et ibidem bona et catalla ipsius querentes cepit et asportavit*. Judgment by default; and on writ of enquiry entire damages were given.

BELFIELD, Serjeant, moved in arrest of judgment, Because no damages ought to have been recovered for beating the wife, since she is no party to the action, nor has the plaintiff laid any special damage, as *per quod consortium amisit*, &c. to entitle him solely to this action. If these damages should be recovered, there may be two recoveries for one assault, for this action would be no bar to any action to be brought by the husband and wife jointly.

CHAPPER contra. The assault of the wife is only laid as aggravation of the damages, and not as a distinct trespass (a).

THE COURT inclined to think that this declaration was good. But *advise vult* (b).

(a) See *Russell and his Wife v. Corne*, 1. Salk. 119. 2. Salk. 640. S. C. 6. Mod. 127. S. C. 2. Lord Ray. 1031. *Ted and his Wife v. Redford*, 11. Mod. 264. *James Osborne's Case*, 10. Co. 130. *Tomlins v. Hice and his Wife*,

Cro. Jac. 664. *Dix v. Brooks*, 1. Stra. 61. S. C. Fort. 378.

(b) It is said, S. C. Fort. 377. that the Court held the declaration good, although the wife was not joined.

The King *against* The Marquis of Powis (a).

Case 16.

UPON A WRIT OF ERROR to reverse an outlawry for HIGH TREASON,

In outlawry for high treason, if the *capias* be to another county than that in which the defendant is described to live, it is an error in fact.

The error assigned was, that the process of outlawry against the marquis was directed to the sheriff of London, when he, the marquis, lived in the parish of St. Giles, in the county of Middlesex; which is an error in fact; for the process of *capias* must be always directed to the sheriff of the county where the party lives.

And for this reason the outlawry was reversed, upon the confession of THE ATTORNEY GENERAL.

S. P. C. 68.
2 Hale, 196.
4. Hawk. P. C. ch. 27. s. 116 to 128.

N. B. There were several exceptions in point of law taken to the record in this Term.

(a) This case came before the Court on Wednesday, the 11 April, 1722; but it was first argued in Hilary Term, in the seventh year of George the First, and finally determined in Michaelmas Term, in the ninth year of George the First.—NOTE to the former edition.

* [27]

* The King *against* The Dean and Chapter of Trinity-Chapel, in Dublin.

Case 17.

THE DEAN AND CHAPTER of Trinity-Chapel, in Dublin, denying Dr. T. S. the archdeacon of, &c. his seat therein, and his voice in the chapter, he brought a *mandamus* in the court of king's bench in Ireland, directed to them, suggesting, that his predecessors, time out of mind, had enjoyed the said liberty, and that the franchises and liberties of their corporate body were confirmed by letters patent of Henry the Eighth, &c.

A dean and chapter who have power to make bye-laws cannot make a bye-law that an archdeacon shall take the oath of canonical obedience before he is admitted into his office.

THE DEAN AND CHAPTER made a return to the effect following, viz. That by the same letters patent they had power to make bye-laws for the benefit of their corporate body; and that they made a bye-law on such a day, &c. that no person should be admitted a member of their body, unless he had taken the oaths of canonical obedience, and to keep the secrets of the said chapter, which the archdeacon denied to take; and thereupon they refused to admit him.

2. Roll. Rep. 490.
6. Com. Dig. "Sarcinac" (B.).

This return was adjudged insufficient in the court of king's bench in Ireland; whereupon they granted a *peremptory mandamus*, and then the dean and chapter brought a writ of error in the king's bench here.

IT WAS ARGUED in their behalf, that the cause of denial, as returned by them, was a good and sufficient cause; and that a *mandamus* was not the proper remedy for the archdeacon in this case.

THE KING
against
THE DEAN
AND CHAPTER
OF TRINITY-
CHAPEL,
IN DUBLIN.

* [23]

THE COURT AS TO THE FIRST POINT adjudged, that the dean and chapter had not returned a sufficient cause, but that they had usurped a jurisdiction, by tendering or requiring *an oath* to be taken (a), which could not be done but by a court of judicature, or by some special words in the letters patent, giving them authority so to do, which authority could not be implied by any general words, expressing their power to make bye-laws.

A writ of error
will not lie upon
the award of a
peremptory man-
damus.

BUT THE CHIEF POINT was, whether a writ of error would lie upon a *peremptory mandamus*.

S. C. Str. 536.
Poph. 176.
Mod. Rep. 81.
281.
Lev 201.
1. Str. 625.
5. Com. Dig.
"Pleader"
(3. B. 7.).

Lev. 291.

Roll. Abr. 481.
Lev. 119.
Vent. 183.
W. Jo. 199.

And IT WAS ARGUED against the dean and chapter, that a *mandamus* would not lie, because it was a prerogative writ, upon which the particular right of the subject was never yet determined; for it is grantable by the Court only in cases of a public nature for settling the possessions of men, and not between any parties in interest, and therefore no restitution can be granted upon this writ. It is no more than a command to a person to do his duty, as to admit another to an office, or to some freedom, or to some place or freedom which belongs to him to whom it is granted, and for which he has no remedy by any other action. Now in the principal case, as to a place in the chapel and voice in the chapter, it is no more than a *franchise* belonging to the office of archdeacon, for which no *assize*, *ejectment*, or *quare impedit* will lie; and though he might maintain an *action of trespass* on the case for it, yet that is no remedy, because in such cases damages are only to be recovered, and not the franchise itself. It is true, that a *mandamus* will lie to restore a man to his priority of freedom. It may be directed to a bishop to induct a man into his prebendary, and to give oil to a priest in baptism; but such writs, and others of the like nature, shall never be controlled by writs of error; for if they should, many inconveniencies would follow, because it is usual to grant a *mandamus* to parish-officers, and to magistrates, to deliver the ensigns of their temporal offices, or to command them to do their duty in their respective offices; and if writs of error would lie on such commands, it would admit of unsufferable delays. A writ of error was never yet granted where a fine was imposed, or on a commitment for a contempt, or upon the award of any writ by any court of justice, in which cases the properties and liberties of the subject are concerned (b). And if it be not grantable in a criminal action, where a man is deprived of his liberty, there can be no reason why it should be granted in a civil action, as in this case. It is true, this matter was contested in the case of the *Constables of Aylesbury*, viz. whether a writ of error would lie upon the return of a *habeas corpus*, but it was not determined. It is likewise true, that by a late statute a *traverse* is given to the return of a *mandamus*, as if it had been an action on the case; but

(a) 6. Com. Dig. "Serement" (B.).

(b) Hardres, 401.

yet that does not make it an action on the case (a). It is objected, that a writ of error might lie without delaying the party, for it might not be a *superfedeas* (b). But the form of entering the award of a *peremptory mandamus* is an argument that no writ of error lies; for they are never entered "*Idco consider tum est* (c)." When the Court denies a *peremptory mandamus*, there is no pretence that any writ of error will lie, so that the consequence will be, that a writ of error lies only of one side.

ON THE OTHER SIDE it was argued, that though in this case a writ of error would not lie upon the first *mandamus*, because it was in the nature of an *interlocutory judgment*, * and no more, yet it must lie upon this *peremptory mandamus*; for though it was formerly but a letter from THE KING, yet now it has obtained the sanction of an *original writ*; and like such writ, if it bear *teste* out of Term it is void. The reason of the law seems to be plain, that a writ of error will lie upon a *peremptory mandamus*, for it will lie upon any judgment by which the defendant conceives himself to be aggrieved or damaged, unless he has another proper remedy for relief; but the dean and chapter in this case have no remedy but by a writ of error; for if their return to the first *mandamus* was good, and ruled to be otherwise, they are pinned down by such judgment; and though they are wronged by it, they have no remedy.

THE COURT was of opinion, that the right of any person was not to be determined upon a *mandamus*. It gives a remedy where there is a seeming probability for it, and it settles people in their possessions, so that they may be able to defend their right, or, by virtue thereof, to bring any action for things incident to the possession; and if a writ of error should lie in such cases, it would entangle all the public acts of annual officers in most corporations and parishes. It is against the nature of a writ of error to lie on any judgment, but in causes where an issue may be joined and tried, or where judgment may be had upon a demurrer, and joinder in demurrer, and therefore it will not lie on a judgment for a *procedendo*, nor on the return of an *habeas corpus*. It is true, if the defendant in error had traversed the return of the dean and chapter to this *mandamus*, as by the statute 9. Anne, c. 20. he might, in such case the writ of error would have been good, because then a final judgment might be given; for upon the traverse of the facts in the return, the other side may take issue or demur; and such proceedings might be had, as if the prosecutor of the *mandamus* had brought an action on the case for a *false return*; and if he had a verdict or judgment on a demurrer, he shall recover his damages and costs, upon which judgment a writ of error would lie; but it was never yet determined that it would lie upon a *peremptory mandamus*.

(a) By 9. Anne, c. 20.

(b) Every writ of error is a *superfedeas*; 1. S. d. 45. Cro. Jac. 342. Stund v. Palmer, Trinity Term, 2. Geo. 1.

(c) The case of the Corporation of Macclesfield, 16. Car. 2. Roll 35.

THE KING
against
THE DEAN
AND CHAPTER
OF TRINITY-
CHAPEL,
IN DUBLIN.

* [29]

Lev. 91.
Vent. 205. 212.
266.
Sid. 44.
Mou. 258.

THE KING
against
THE DEAN
AND CHAPTER
OF TRINITY-
CHAPEL,
IN DUBLIN.
Fortesc. Rep.
329.

And therefore IT WAS RESOLVED by THE WHOLE COURT, that it would not lie.

A WRIT OF ERROR was afterwards brought on this judgment in the house of peers; and THE LORD CHIEF BARON, who attended there, together with seven other Judges, acquainted the lords in parliament, that ALL THE JUDGES OF ENGLAND were of opinion, that a writ of error would not lie.

* [30]

* And thereupon the judgment of the court of king's bench was affirmed (a).

(a) On 21 April, 1724. 10. Geo. 1.

Case 18.

Muck's Case.

A declaration in slander for saying, "A stole a sheep of his," INNUENDO a sheep of the defendant, is good.

AN ACTION ON THE CASE was brought against *Muck* for slanderous words, viz. "*Muck* stole a sheep of his" (*innuendo* of the defendant), "and it was not the first he stole by a hundred." Upon not guilty pleaded the plaintiff had a verdict.

The defendant moved in arrest of judgment, that the words were not actionable; for "*Muck* stole a sheep of his" must be intended *Muck's* own sheep, for the particle *his* must refer *ad proximum antecedens*, which is *Muck*, so that these words are repugnant; for a man cannot steal his own sheep; like the case in *Roll. Abr.* 74, where an action was brought against husband and wife for words spoken by the wife, viz. that "the plaintiff stole some of her goods;" and it was adjudged not actionable, because a married woman cannot have any goods, for they are the goods of the husband.

But in the principal case THE COURT over-ruled the objection, and held the words actionable as laid in this declaration.

Case 19.

Carvell, &c. against Manly.

In trespass, and false imprisonment for seven months; a justification under a *capias ulagatum*, alleging it to be the same trespass, and TRAVERSING that he was guilty before the delivery, or after the return of the writ, is bad on a special demurrer.

ACTION OF ASSAULT AND FALSE IMPRISONMENT for seven months from the first of *October*. The defendant justified for the whole time by virtue of a writ of *capias ulagatum, quæ est eadem transgressu, captis, imprisonamentum, et detentis*, &c. and then traversed, *absque hoc*, that he is guilty at any time after the return of the writ.

The defendant who sued out the writ justified under it; and upon a special demurrer to his plea the plaintiff had judgment in the common pleas, because the justification was under a writ taken out at such a time, and the defendant did not conclude his plea with *prout patet per recordum*, nor traverse that he did imprison the plaintiff at any other time.

S. C. Prac. Reg. 271. S. C. Fort 379. Stra. 694. Lutw. 1437. Cro. Eliz. 504. 1. Will. 81. 219. 2. Bi. Rep. 776.

Hilary Term, 8. Geo. 1. In B. R.

And now upon a writ of error in the court of king's bench CARVELL, &c.
upon that judgment, the error assigned was, the want of a good against
original. MANLY.

It is true, there was an original, but it was not returned, and therefore it is void.

The general errors were assigned : and also, that no bill was filed, but upon alledging *diminution* a bill was returned filed of another Term ; but no return to that bill was certified.

To WHICH *it was answered,*

FIRST, That there are two sorts of returns, one made on the roll, and the other by the sheriff. Now, though there was no return made by the sheriff on this original, yet there being one filed on the roll, and certified from thence as returned, that is sufficient to make it a good original.

And as to the objection against the plea, *viz.* that the defendant had justified under a writ, and did not conclude, * *prout patet per recordum* ; and that he had not traversed the imprisonment at any other time than upon the writ sued out at such a time ;

* [31]

IT WAS ARGUED, that if the action had been brought against the sheriff, and he had justified under the writ, he must have concluded his plea with *prout patet per recordum*, because it would not have been a record if he had not returned the writ ; but though he never returned it, it is still a good justification for the defendant in this action. But it is not absolutely necessary for a defendant to conclude his plea with *prout patet per recordum*, because a writ may be lost.

And as to the other objection, that the defendant did not traverse the imprisonment at any other time, &c. that is only surplusage ; for if the justification is good, the traverse would be wholly immaterial. Lev. 211.
3. Lev. 227.
Lut. 1452.

THE COURT. The *original* gives jurisdiction to this court, and by consequence if that is not returned, the Court has no jurisdiction in this case ; and the cause cannot properly be said to be in court ; but if the sheriff never returned the writ, how could the defendant in this action plead *prout patet per recordum* ? therefore his plea must be good without such conclusion ; and if his plea is good, then the traverse will be immaterial.

So the judgment in the common pleas was affirmed.

Glynn against Yates.

Case 20.

THE CASE was thus : The principal died, not having surrendered himself before the return of the second *scire facias*. The bail are liable, if the principal die between the return of the *ca. su.* and the second *scire facias*.—S. C. 1. Stra. 511. Post. 340. 1. Stra. 198. 2. Stra. 717. 2. Ld. Ray. 1452. 2. Will. 67. 1. Burr. 244. 436. 1. Bl. Rep. 393. 811. 3. Burr. 1360. Tidd's Pract. 145, 146.

GLYNN
against
YATES.

Upon a motion the question was, Whether the bail are liable to the debt?

IT WAS ARGUED *against the bail*, that they are liable; for in strictness of law, upon a *capias* awarded and filed against the principal, and *non est inventus* returned, the bail afterwards are liable. It is true, by the favour of the Court they have time to render the principal until the return of the second *scire facias* against them (a); and therefore that matter ought to be pleaded to the *scire facias*, and not to be allowed upon a motion; but it cannot be pleaded, because it is not law.

* [32]

TO WHICH it was answered, that if it is not law, and therefore not to be pleaded, it is the greater reason that it should be determined upon a motion; for the death of the principal being the act of God, it shall never be prejudicial to the living; and the plaintiff has no damage by the death of the principal, because he might have died if he had been in gaol; but it would be a great damage to the bail, if they should not be discharged by his death.

PRATT, *Chief Justice*. The bail are bound by their recognizance to render the principal where judgment is had against him, or to pay the condemnation-money; but by the course of the Court the principal has time to render himself in discharge of the bail until the second *scire facias* against them is returned; and here the act of God intervened, *viz.* the principal died, so that he could not render himself within that time.

EYRE, *Justice*. It is true, the grace of the Court is usually extended to the bail, where the principal surrenders himself, but never where he does not. This was the course of the Court when POPHAM was *Chief Justice*, but it was altered by my LORD COKE, and altered again in *Croke's* time (b); That if the principal surrendered himself before the return of the second *scire facias* against the bail, they should be discharged; but the indulgence of the Court never extended farther (c). It is wrong to say, that the plaintiff has no damage by the death of the principal, dying before the time he had to surrender himself; for it is seen by daily experience, that men will pay their debts rather than be committed: and so might the principal in this case rather than to be rendered in custody. Besides, *the plaintiff* is a stranger to the bail, and there is no trust or privity between him and them, but there is a great trust between *the principal* and *the bail*; so that it seems very reasonable they should suffer in this case rather than the plaintiff, who is an innocent person; for it is probable they may have counter-security from the principal to indemnify them; and therefore it is more proper for them than for the plaintiff to sue his executor or administrator upon such counter-security; for it is to be presumed, that by reason of that trust which is between them, they may

(a) Meor, 775. Cro. Jac. 97. 165. (b) Cro. Eliz. 738.
Bullst. 331. W. Jones, 138. Hob. 210. (c) 1. Salk. 101.
T. Raym. 14. 6. Mod. 238.

know more of his concerns than it is possible for the plaintiff to know.

GLYNN
against
YATES.

So, on the last day of the Term, judgment was given for the plaintiff against the bail.

* [33]

* Atkinson, Executrix of Atkinson, against Coatsworth. Case 21.

UPON A WRIT OF ERROR on a judgment in an action of covenant the case was :

One *Snell*, by indenture of lease, demised lands to *Atkinson* the testator for a certain term of years, rendering rent, and performing other covenants therein-mentioned. *Atkinson* afterwards made an under-lease of the premises to the defendant *Coatsworth*, who therein covenanted with *Atkinson* "to perform and keep all the " covenants in the original lease to be kept and performed by the " said *Atkinson*, his executors, &c. or assigns." *Atkinson* having made his wife, the now plaintiff, executrix, died. The rent reserved on the original lease not being paid, she brought an action of covenant against *Coatsworth*, and assigned for breach the non-payment of the rent, &c.

If an under-lessee covenant to perform all the covenants in the original lease, and an action for breach of covenant be brought by his lessor, declaring, "that by an indenture made between the parties aforesaid, it was covenanted, &c." these words imply, that the original lease was executed by the plaintiff, and, if they did not, the defendant is estopped, by having executed the under lease, in which the original lease is recited, from saying, that there is no such lease or covenants.

Upon the general issue pleaded, the cause was tried at the assizes in *Durham*, and the plaintiff had a verdict and judgment.

Upon a writ of error brought by the defendant, the error assigned was, that the plaintiff in her declaration had not set forth that *Atkinson* her testator executed the original lease on his part, for if it was not signed and sealed by him, then it was not his deed. It is true, that being executed by *Snell*, it had all the essential qualities of a deed ; but it does not follow from thence that it was the deed of the testator, and by consequence the defendant shall not be bound by a covenant relative to such deed. If it should be objected, that the defendant in this case is estopped by his own deed (made between him and *Atkinson*) to say that the original deed is not the deed of *Atkinson*, because that very original deed is recited in his own deed ; the answer is, that this general estoppel does not bar him from saying, that by the first lease there is no rent reserved, or to be paid by *Atkinson* ; for the defendant is to perform no more than those covenants which were to be performed by *Atkinson*, and the plaintiff must shew what those covenants are before she can be entitled to this action.

S. C. 3. Danv. 265.
S. C. 1. Stra. 512.
Ld. Ray. 1377.

ON THE OTHER SIDE it was argued for her, that by her declaration she has set forth, " that per indenturam factam inter " partes prædictæ. *Atkinson* did covenant, &c." Now these words imply, that the indenture was executed by him on his part ; and therefore she need not set forth all the circumstances of signing, sealing, and delivering, because her alledging that it was made inter partes prædictas implies all the rest. So where the plaintiff declared, that the testator *desigavit*, or that the lessor *fecisset*, &c.

* [34]

Lutw. 333.

ATKINSON,
EXECUTRIX OF
ATKINSON,
against
COATSWORTH.

these words imply all other requisites either to a will or a feoffment ; and if so, then *facta* in this case implies all requisites to the making an indenture, and *convenit* all requisites to the making a covenant. Besides, the original indenture being recited in the other, in which the defendant covenanted “ to perform all the “ covenants therein, which on *Atkinson’s* part were to be paid, “ done, or performed,” he is now barred to say there are no such covenants in the original lease, because he has allowed it to be an indenture, and with such covenants.

THE COURT. The substance of the objection is, that the plaintiff has not set forth in her declaration, that the original indenture was signed and sealed by *Atkinson* on his part, or that it was his deed ; for if it was not, then the defendant is not bound to perform the covenants therein contained ; but the plaintiff has alledged, that it was an indenture *facta inter partes prædictas*, which implies that both *Snell* the original lessor, and *Atkinson* likewise, signed the deed, and so it became the deed of both parties ; for where an indenture is made between two parties, that must be implied ; and the other circumstances of sealing and delivering it as his deed need not be set forth. As to the *stoppel*, it is very full against the defendant, for he has covenanted in the second lease “ to perform all the covenants in the original lease which on “ *Atkinson’s* part were to be paid, done, or performed ;” by which he is now *estopped* to say, that there are no such covenants in the original lease.

Moor, 23.
Poph. 115.
Roll. Abr. 872.

* [35] So the judgment was affirmed.

Case 22. The King against The Mayor and Common-Council of Bedford.

IF the custom of a corporation be to elect thirteen common-council-men out of twenty-five

A RULE OF COURT was made against the mayor and common-council-men of *Bedford*, to shew cause why AN INFORMATION should not be filed against them for an undue election of a burgeois of the said borough.

THE CASE appeared to be thus : * The town of *Bedford* is a borough by prescription ; and time out of mind, on the *Monday* next after *Bartholomew-Day* had put up twenty-six burgesses, in nomination, out of which they chose thirteen common-council-men, who, when chosen, had votes, in electing a mayor and other officers in the said borough. At the last election, on *Monday* after *Bartholomew-Day*, they put one *Benson* in nomination, with twenty-five more, who were burgesses, but *Benson* was only a freeman of the said borough, and not a bourgeois ; and he was chosen by the majority of the other twenty-five burgesses to be one of the thirteen common-council-men. Afterwards, the mayor finding that *Benson* was not qualified to be one of the twenty-six burgesses, and that the mayor shall be chosen by the majority of the thirteen, and a man who is only a freeman, and not a bourgeois, be one of the twenty-five, and be chosen a common-council-man, such election is void, and the corporation may proceed to a new election of common-council-men.

burgesses,

burgesses, for the reason before-mentioned, proceeded to a new election, and they chose one *Devereux* to be a burges in the room of *Benson*.

THE KING
against
THE MAYOR
AND COMMON-
COUNCIL
OF BEDFORD.

And now *Hughes*, who was one of the other twenty-five burgesses, and put in nomination as aforesaid, and who was duly qualified, and had most votes to be a common-council-man next to the said *Benson*, prosecuted AN INFORMATION against the mayor and the twelve common-council-men, as not being chosen by twenty-six qualified burgesses; for that *Benson*, one of the twenty-six, was a freeman and no burges, and therefore the whole election void, as not warranted by the custom of the borough.

THE COUNSEL for them insisted, that the rule might be discharged; for when an election is made by several persons, whereof some are qualified to chuse, and some not, it is good as to the persons qualified; for if it should be otherwise, and the election wholly void, and that they cannot re-elect, there would be an end of this borough by prescription, for then they can neither have burgesses nor common-council-men, who are to name the bailiffs, and who have votes at the election of a mayor. Therefore to avoid this inconvenience, if one unqualified person be chosen, they may elect another who is qualified, as soon as they understand he is unqualified; and this has been the constant course in this borough.

THE COUNSEL for the prosecutor denied this; for they insisted, that where an election is made by one or more persons unqualified, if it be void as to the person elected, yet he who has most votes next to the unqualified person elected shall be deemed duly chosen. It is true, that where persons apparently unqualified are nominated, or put up for candidates, in such case, an election made by or out of such persons is entirely void, because it is an undue election, and shall not stand for any part, especially * when, by the custom of the place, such a determinate number of qualified persons are to chuse. Now in this case, one of the persons nominated to be a burges being only a freeman, and no burges, and the choice of common-council-men being to be made on a certain day, and by a particular number of burgesses, if it be not made on that day, nor by that number, the whole election is void (a), and not as to the unqualified person alone; for if he had not been put in nomination as a burges, he might have voted as a freeman, the benefit whereof was by this means lost, both as to himself and his friends. It is true, in some cases the borough might proceed to a new election; as where the person chosen did not receive the sacrament within a year, &c. or where he had not taken the oaths, &c. because these are disabilities which arise after the election, and might not be known before; but where the disability is apparent before the election, as it was in the principal case, then it is void from the very beginning.

(a) But see 11. Geo. 1. c. 4.

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OF BEDFORD.

PRATT, *Chief Justice*, and two other of the Judges, were of opinion, that what was insisted on by this motion for the prosecutor would introduce a great inconveniency; for if this should be adjudged a void election as to the whole, then the borough would be destroyed, for there cannot be any other mayor, or any thing done by common-council men. Therefore if some unqualified, as *Benson* was, are put in nomination with those who are qualified, as the other twenty-five were, and the unqualified person is chosen, as *Benson* likewise was, it avoids the election as to him only, and not to the other twelve common-council-men who were duly chosen and qualified; and where there is no fraud, but a plain mistake, the re-election of a qualified person shall be good.

BUT THE FOURTH JUSTICE differed in opinion, for it was not clear to him how thirteen common-council-men, who by the custom of the place were to be chosen out of twenty-six qualified burgesses, could be lawfully chosen out of twenty-five, for they might as well be chosen out of any other number, if once the custom is broken. However, HE WAS OF OPINION, that *Hughes*, who had the most votes of the twenty-five burgesses duly qualified, next to *Benson* who was not qualified, was duly chosen; therefore, that the plaintiff complaining ought not to be hindered to try his right upon this information.

* [37] This being upon the first motion, and THE COURT being not all of one opinion, the rule was enlarged as to the person re-elected, and discharged as to the rest.

And afterwards, on another day, and upon another motion to set aside the rule as to the person re-elected,

THE QUESTION was, Whether if one who is unqualified be chosen by a majority of those who are qualified, and his election is made void because he is unqualified, a person who is qualified, and has the majority of votes next to him who is not qualified, shall be adjudged duly chosen, or whether they must proceed to a new election?

IT WAS INSISTED that *Hughes*, who was qualified, and who had the most votes next to *Benson*, who was not, but yet was chosen, shall be deemed to be a duly elected burgess, and the new election of *Devereux* shall be void and set aside. It is no excuse to say, that they did not know *Benson* was not qualified at the time he was chosen burgess, because it was in their power to be duly informed of the truth, for they had all the borough-books in their custody; and ignorance can be no excuse where they had all the means of knowing the truth amongst themselves. Therefore all the votes given to *Benson* were thrown away, and he who had the most votes next to him

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him is duly elected, and the borough ought not to have proceeded to a new election. THE KING
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But THE COURT held the new election to be good, as well for the mistake in not knowing *Benson* was no burghers, but a freeman at the time of his election to be a common-council-man, as for avoiding an inconveniency, which otherwise would be incurable.

So the election of *Devereux* was held good: and THE RULE discharged.

E A S T E R T E R M,

The Eighth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powis, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

* [38]

The King *against* The Inhabitants of Brickhill.

Case 23.

TWO JUSTICES OF THE PEACE made an order to remove one *Green* and his wife and seven children from the parish of *Horewood* to the parish of *Brickhill*; which order was confirmed upon an appeal to the sessions, and both the said orders were removed by *certiorari* into the court of king's bench.

A tenant who is rated to the land-tax by the name of "The Occupier of *Roscoe's*," gains a settlement by paying such rate. S. C. 19. Viner, 385. 2. Burr. 1062.

THE CASE appeared to be thus: *Green* being a poor man lived last at *Horewood*, at a place called "*Roscoe's Tenement*," and paid taxes there by the name of "The Occupier of *Roscoes*;" and for that reason he and his wife and children were sent thither.

IT WAS MOVED to quash these orders, because this man ought to be personally charged to pay taxes, otherwise he gains no settlement by paying them as occupant of a tenement, though he was likewise charged as *farmer* thereof at that time; for that word "farmer" does not prove him to be occupant, because he may let the tenement over to another.

BUT ON THE OTHER SIDE it was insisted, that paying taxes by the name of "Occupant of *Roscoe's Tenement*," and naming him farmer of the same at that time, is a sufficient designation of the person to gain a settlement there.

And

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And THE COURT being of that opinion, these orders were quashed (a).

(a) See Rex v. Uffculme, 2. Bott P. L. 233. Burr. S. C. 430. Painſwick v. Cirencester, Burr. S. C. 455. Openshaw v. Gayton, Burr. S. C. 522. Rex v. Stanley, Burr. S. C. 627. Rex v. Carlston, Burr. S. C. 809. Ashley v. Walsall, Cald. 35. Rex v. Southwark, Cald. 62. Rex v. Hickmndwicke,

Cald. 103. Rex v. Mitcham, Cald. 276. Rex v. Chew Magna, Cald. 365. Rex v. St. James, Bury, Cald. 385. Rex v. Llangammarch, 2. Term Rep. 628. Rex v. Folkestone, 3. Term Rep. 525.—And see 2 vol. Mr. Conit's edit. of Bott's Poor Laws, p. 227. to 281. where all the cases on this subject are collected.

* [39]

Cafe 24. * The King against Inhabitants of Rufford and Dunnington, in the County of Nottingham.

Overseers may be appointed, under the 43. Eliz. c. 2. for an *extraparochial* place, if it be a *vill*.

S. C. 1. Stra. 512.
Fort. 321.

A MANDAMUS was directed to the justices of the peace, &c. to appoint *overseers of the poor* in the town of *Rufford*. The justices return, that *Rufford* is an *extraparochial* place, and therefore are not to provide for their poor.

IT WAS OBJECTED against this return, that admitting it was true, yet the justices are obliged by the statute 43. Eliz. c. 2. to appoint *overseers of the poor* even in *extraparochial* places, because in the enacting part of the statute the words are general, and extend to all places, viz. "That the churchwardens of every parish, and two or more householders thereto be nominated yearly in *Easter* week, or within one month after, under the hands and seals of the justice of the peace, are to be called overseers of the poor, &c."

ON THE OTHER SIDE it was said, that the question in this case, was, whether *extraparochial* places are within this act; for as to the poor in general, the common law leaves them to their own industry, or to the charity of their neighbours. And it was argued, that *extraparochial* places are not within that statute; that the best expositors of acts of parliament are the acts themselves; now this act says, that the overseers of the poor must meet monthly in "the parish-church or chapel," which is a certain indication that an *extraparochial* place is not comprehended by the act, because it is impossible for them to meet in a church or chapel where there is none; and there is a penalty of twenty shillings inflicted by the statute for not meeting in such place; that the justices have no power to appoint overseers, for no statutes that have been made for provision of the poor extend to *extraparochial* places; the statute 43. Eliz. c. 2. only mentions "*parishes*," and seems to exclude *extraparochial* places, by making a particular provision for the island of *Fexhefs*, in *Kent*, that place being no parish; the 13. & 14. Car. 1. c. 12. f. 21. enacts, "that several towns and vills in particular counties shall be provided for and managed as parishes are directed to be by 43. Eliz. by chusing overseers, &c.;" the statute 1. Jac. 2. c. 17. sect. 2. only uses the word "*parish*;" and 3. & 4. Will. & Mary, c. 11. f. 2. uses the words "*parish* or *town*;" none of which statutes extending by express words to any

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any *extraparochial places*, will not be enlarged by construction of law; for privileges of *extraparochial places* are annexed to gentlemen's estates, of which they ought not to be deprived by any implication or construction of law, but by plain, express, and certain words. If it should be objected, that it may be a great hardship to those who would have a settlement in such places, if they were not within this statute, for then the poor could have no relief, the answer is, that it cannot be any hardship, because they may remove to the place where their parents were settled, and there would be no hardship to any but only to bastards born in such places.

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THE COURT was of opinion, that *extraparochial places* are within the words of the statute; for the justices of the peace, by the general words, have power to name overseers in all parishes, which must extend as well to *extraparochial places*, as to all parishes in general; and no subsequent words shall controul the general words in the enacting part; and certainly all the poor acts shall be construed to extend * to such places, as well as to other parishes, when they are within the same mischief, and shall be subject to the controul of the justices of the peace; but the penalty for not meeting in the church shall never be inflicted on the overseers of the poor, because the inhabitants of *extraparochial places* have no church to meet in. Most of the forests in *England* are *extraparochial*, and so is *Christ-Church* in *Oxford*, but they ought to maintain their own poor. This is a *vill* consisting of several inhabitants, and so is within the provision of the statute 13. & 14. Car. 2. c. 12. for a *vill* in a county, not therein particularly mentioned, will be within the remedy thereby provided; for all cases within the reason are within the remedy of the law. There is no doubt but justices have the same power to appoint overseers in *towns* and *vills*, though *extraparochial*, as in *parishes*: and this has been settled (a). The word "parish" is not in the body of statute 43. Eliz. c. 2. but only in the preamble.

* [40]

Jones, 165.
Palmer, 485.
Cro. Car. 438.
The King v. Al-
thoe, S. P. post.
144.

Let there be a *peremptory mandamus*; which afterwards issued, bearing *teste* on the twenty-sixth day of *April*, in the eighth year of *George the First*.

EXTRACT FROM THE WRIT.

" Cum ostensum sit nobis ex gravi querelâ diversorum inhabitan-
" tium parochiæ de DUNNINGTON, in com. nostro LINCOLN, quod
" sunt diversi patres-familias, ANGLICE " householders," et
" firmarii habitantes et residentes infra villam nostram de
" RUFFORD in com. nostro NOTT. prædicto substantiales et idonei,
" ANGLICE " able," ad æqualiter contribuend. inter se pro et erga
" manutentionem et relevamen omnium pauperum ejusdem villæ.
" Cumque nulli sint guardian. ecclesiæ vel supervisor pauperum
" villæ de RUFFORD prædictæ per vos seu aliquos vestrum adhuc

(a) See Rex v. Welbeck, 1. Bott P. L.
24. Rex v. Showler and Atter, Burr.
3391. Rex v. Justices of Bedfordshire,

Cald. 167. Rex v. Justices of Peter-
borough, Cald. 238. Rex v. Ronton
Abbey, 2. Term Rep. 207.

" nominat.

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“ nōminat. et appunctuat. infra eandem villam ad faciend. aliquam
“ equalem ratam sive assēsmentum vel aliquas equales ratas sive
“ assēsmenta preut eis videbitur fore necessar. super omnes et
“ singulos patres-familias et firmarios prædict. inhabitant. et
“ resident. infra vil. prædict. pro et erga manutention. et relevamen
“ pauperum vill. illius ad damnum non modicum et gravamen præ-
“ dict. inhabitant. paroch. de D. in com. nostro L. prædict. et
“ pauperum dictæ villæ de R. in com. nostro NOTT. ac in magnam
“ indigentiam et oppressionem pauperum ejusdem villæ : Nos igitur,
“ &c. Teste JOHANNÉ PRATT milite apud WESTM. nono die
“ Junii anno regni nostri (GEO. I.) septimo.”

The return : “ Quid villa de RUFFORD in brevi inframentionat.
“ vel alicujus inde parcell. non existit nec tempore emanationis brevis
“ prædict. vel unquam postea fuit pars parochiæ de DUNNINGTON
“ in brevi prædict. mentionat. vel alicujus aliæ parochiæ, vel
“ infra parochiam de DUNNINGTON præd. vel aliquam al. parochiam,
“ sed villa de RUFFORD præd. est, et a tempore cujus contrar.
“ memoria homin. non existit, fuit locus extraparochialis absq.
“ aliquâ ecclesiâ seu capellâ parochian. seu al. ritibus
“ parochial. villæ præd. seu inhabitantibus villæ præd. spectant.
“ sive pertinent. Quodq. per totum tempus præd. nunquam fuer.
“ aliqui supervisores pauperum vel aliqui al. officiar. parochial.
“ ejusdem villæ de RUFFORD. Et eâ de causâ non nominavimus
“ seu appunctuavimus nec nominare seu appunctuare possumus sive
“ debemus aliquas personas fore supervisor. pauperum ejusdem villæ
“ de RUFFORD.”

Case 25.

Lock against Wright.

Hilary Term, 7. Geo. 1. Roll 353.

IF *A.* covenant by a deed-poll to assign so much scrip as soon as the receipts should be delivered, and *B.* covenant, in consideration thereof, to accept the same, and to pay so much money to *A.* on a certain day for the said scrip, a declaration in debt for non-payment of the money on the day, brought by *A.* on this agreement, must aver, that the scrip was assigned to *B.* or a tender to assign it made, when the receipts were delivered out. — S. C. 1. Stra 569. Post. 68. 1. Sak. 112. 171. 2. Lev. 23. 2. Saund. 351. Stra. 615. 712. 2. Burr. 899. 5. Com. Dig. “Plader” (C. 53.). Cowp. 56. Deegl 690 1 Bac. Abr. “Covenant” (B).

DEBT UPON CERTAIN ARTICLES, dated the sixteenth day of September 1720, for the penalty on a bond for not performing covenants on a South-Sea contract.

THE CASE was this : The plaintiff *Lock* by a deed-poll covenanted to assign five hundred pounds *South-Sea* stock, or credit in the fourth subscription, to the defendant, as soon as the receipts should be delivered out ; and the defendant covenanted, in consideration thereof, to accept the receipts as soon as the same should be delivered out, and to pay nine hundred and fifty pounds to the plaintiff on the sixteenth day of *November* following, for the said five hundred pounds credit.

Afterwards, by an act of parliament, 7. Geo. 1. st. 2. c. 1. the Company were prohibited from giving any receipts for so long time.

Afterwards, by an act of parliament, 7. Geo. 1. st. 2. c. 1. the Company were prohibited from giving any receipts for so long time.

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And now in an action of debt upon the covenant brought by the plaintiff, he declared, that the defendant, *pro consideratione* of the said stock sold to him, covenanted to pay nine hundred and fifty pounds to the plaintiff at such a time, and assigned the breach in non-payment of the money at the time, *viz.* on the said sixteenth day of *November, secundum formam articulorum*, and therefore demanded the penalty.

The defendant demurred to the declaration, because the plaintiff had not set forth that he delivered the receipts, or averred a *tender* thereof.

IT WAS ARGUED *for the defendant*, that this declaration was ill, because the plaintiff had not alledged the performance of the covenants on his part, which he (a) ought to have done to entitle him to this action, it being in the nature of a *condition (b) precedent*, and not of *mutual covenants*; to prove which the authorities in the margin were (c) cited.

ON THE OTHER SIDE the Counsel *for the plaintiff* argued, that this declaration was good, because the defendant was to pay the money on a certain day; but there was no indefinite term for the delivery of the stock; for that was to be delivered when the books of the Company were opened; therefore although the plaintiff was hindered to deliver the stock before the day appointed for the payment of the money, yet the defendant ought to pay it on the very day he had covenanted so to do; for this was a contract *executed*, * and not *executory*; and from the very time of the agreement the defendant had credit for the stock. It is true, he had no remedy at law to recover it; but he had a proper remedy in equity, and he could have no other if he had the receipts, for these are only an evidence that he had so much stock in the Company. Besides, this is an action of covenant upon a specialty, in which it is not requisite to lay a consideration to entitle the plaintiff to the action; therefore, though he alledged that he covenanted to assign the stock, &c. and that the defendant *pro consideratione inde* covenanted to pay the money, this does not destroy the specialty; for he cannot give such consideration in evidence at or before the day of payment of the money, being tied up by an act of parliament, to which every man is virtually a party; and the covenant on the defendant's part being to accept the receipts whenever the Company would give them, and to pay the money on a certain day, he ought therefore to pay it on that day, and not to wait the time of the delivery of the receipts, which by the original agreement was indefinite.

* [41]:

THE COURT, upon the first argument of this case, was of opinion, that since it was agreed by the Counsel for the plaintiff, that the

(a) 7. Co. 9. 1. Lev. 87.

(b) Dyer, 76. Hob. 41. 1. Saund. 320.

(c) Dyer, 76. Plowd. Com. 202.

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482, 483. 7. Rep. 38. Saund. 320.

Vent. 147. 371. Lutw. 490. 3. Mod. 39. Salk. 172. Com. Rep. 98. pl. 67.

Ld. Raym. 235, 662. 12. Mod. 455.

E

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defendant had no remedy for this stock but in a court of equity, it would scarcely be allowed that an equitable interest will be a good consideration to support an action at law; and that the case which comes nearest to the principal case in sense happened in the time of *HOLT, Chief Justice*, which was thus (a): A man hired another for a year; and it was agreed on all sides, that the person thus hired could have no action for his wages until the year was expired; but if the master had covenanted to pay it on a certain day within the year, in such case an action would lie before the year was ended. But the principal case goes farther, for there the consideration was merely an equitable interest.

* [42]

Afterwards, in *Trinity Term*, in the ninth year of *George the First*, the following judgment was given for the defendant, because this deed of covenants being only A DEED-POLL, it is, for that reason, the deed of the defendant only; and therefore the covenants cannot be mutual; and it would be very hard that the plaintiff should maintain this action for the money before he transfers or tenders to transfer the stock, when the defendant has no remedy to recover it at law, but only a right to have it decreed to him in equity. * In all executory agreements, and this is one, where one thing is to be performed *pro* or *in* consideration of the performance of something on the other part, the word "*pro*" amounts to a *condition precedent*, so that the plaintiff cannot sue without averring a performance of the condition; where "*pro*" denotes the consideration, it is a condition precedent; "*pro*" is a proper word to create a condition (b). In a grant of an annuity *pro una acra terræ*, the word *pro* shews the cause of the grant, and therefore amounts to a condition; for if the acre be evicted, the annuity ceases (c); but a feoffment of land *pro consilio impenso*, &c. if the feoffee deny Counsel, yet the feoffor cannot re-enter, for the sale of the land is executed. As "*pro*" is a proper word of condition, so it may be construed either precedent or subsequent, as best answers the intent of the parties. If I sell a horse for ten pounds, the vendee cannot sue for the horse, without averring payment, or tender of the money. The several distinctions in the case of *Thorpe v. Thorpe* (d) are very nice and reasonable. So is the case of *Coknel v. Biggs* (e), which was thus: An agreement was made that the defendant should pay so much money within six months, the plaintiff transferring his stock, which he agreed to do, the defendant paying the money agreed on; and it was adjudged, that if either party sue upon this agreement, the one must aver and prove a transfer of the stock, or a tender to be transferred, and the other must aver and prove the payment of the money, or a tender of payment, because the transferring in the first part of the agreement is a *condition precedent*; and though these are *mutual promises*, yet where the

(a) See 3. Viner's Abr. 7.

(b) Co. Lit. 204. a.

(c) 7 Co. 10.

(d) 1. Ld. Ray. 662. Comy. Rep. 58.

(e) 1. Salk. 112. And this case in Salkeld is infinitely stronger according to the manuscript; but not so strong according to Strangr, 572.

One thing to be done is the consideration for doing the other; the performance of that thing must be averred. It is true, the Book goes farther, *viz.* "unless there is a certain day appointed for the performance," which makes it exactly like the principal case. So where in an action on the case the plaintiff declared, that there being a discourse of a mortgage, &c. (a), the plaintiff agreed to release the equity of redemption, and, in consideration thereof, the defendant agreed to pay seven pounds, and there were mutual promises laid, and the plaintiff averred the performance on his part, and that the defendant had not paid the seven pounds, it was adjudged, that the releasing the equity of redemption was part of the agreement which the plaintiff ought to execute, for it was upon that consideration that the defendant was to pay the money; therefore the release was to precede, and until that was executed the plaintiff had no cause of action. Now in the principal case, that this is A DEED POLL, they grounded their opinion upon the case of *Portage v. Cole* (b), which was thus: There was an agreement in writing between the parties, that the one should pay five hundred pounds to the other for all his lands, in witness, &c.; this agreement was mutually executed, &c. and afterwards the plaintiff brought an action of debt for the five hundred pounds, without averring in his declaration, that he had conveyed the lands; or tendered a conveyance thereof; and it was adjudged, that after the day was past, on which, by agreement, the lands were to be conveyed, the action was well brought for the money, because this was a * mutual agreement, upon which either party has a mutual remedy; but it is otherwise where the preposition "*pro*" makes it a *condition precedent*: and the Court held, that it would have been otherwise in the case last mentioned, if it had been the deed of one of the parties. The true distinction is between A DEED-POLL and AN INDENTURE executed by both parties; if one agree to do an act, and the other agree to pay *pro* the act, the first person cannot sue for the money without averring performance of the act: "*pro*" does not make a *condition precedent*, where the deed shews the intent of the parties to be contrary; as if the money be agreed to be paid before the act can be done. In this case the defendant has no remedy to compel a transfer of the stock, if he pays the money.

Wherefore judgment was given for the defendant (c).

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* [43]

See Stra. 572.
Ld. Raym. 665.

(a) Salk. 172. Lutw. 245.

(b) Saund. 319. 2. Keb. 542. Raym. 188. 1. Sid. 423. 1. Vent. 147. 1. Lev. 274.

(c) See Wyvel v. Stapleton, post. 69. Blackwell v. Nash, post. 105. Shelburn v. Stapleton, post. 234. Bullock v.

Noke, Stra. 579. Duke of Rutland v. Hodgson, Stra. 577. Bowles v. Bridges; Stra. 832. Rhodes v. Lovit, Bunb. 70. Merit v. Rome, Stra. 458. Clark v. Tylson, Stra. 594. Dawson v. Myer, Stra. 712. Jones v. Barkley, Dougl. 685.

Cafe 26.

Lawrence against Jacob.

Thursday, 26 April 1722.

In an action on a promissory note against the indorser, the plaintiff need not alledge a demand on drawer.

S. C. 1. Stra.

515.

Stra. 649.

Com. Rep. 563.

pl. 240.

Pract. Reg. C.P.

358.

UPON A WRIT OF ERROR in the court of king's bench upon a judgment in the common pleas the case was :

The plaintiff, who was the executor of a second indorsee of a promissory note, brought an action against the indorser for default of payment by the indorser ; and after a demurrer to the declaration, and judgment for the plaintiff in the common pleas,

A writ of error was brought in the court of king's bench.

The error assigned was, that the plaintiff in his declaration did not set forth that the drawer had notice of the indorsement, nor any demand or default alledged in the drawer.

Sed non allocatur : it being the constant form, and matter of evidence.

The judgment was affirmed (a).

(a) The same point was determined in the case of *Finn v. Hook*, Easter Term, 10. Geo. 2. on the authority of this case, and on the reason of the thing ; for the defendant by his *demurrer* admits, that in consideration of the premises, *viz.* the defendant's making the indorsable note, and the indorsing it to the plaintiff, the defendant assumed to pay the money, according to the tenor of the note, Comy. Rep. 562. NOTE to former edition.— In the case of *Bromley v. Furzen* also the same point was determined, 1. Stra. 441. But in the case of *Collins v. Butler*, Hilary Term, 11. Geo. 2. *Lxx*, Chief Justice, held, that a demand upon the drawer is necessary before an indorser can be charged, 2. Stra. 1087. And it appears, that the Judges were for some time of different opinions on this subject, 2. Burr.

671. But in the case of *Heylin v. Adamson*, Mich. Term, 32. Geo. 2. it was determined, that in actions on *inland bills of exchange* by an indorsee against an indorser, the plaintiff must prove a demand of, or due diligence to get, the money from the drawee or acceptor, but need not prove any demand of the drawer ; and that in actions on *promissory notes*, by an indorsee against an indorser, the plaintiff must prove a demand of a due diligence to get the money from the maker of the note, 2. Burr. Rep. 678. And in an action against the drawer or indorser of a bill, it is necessary to state a demand of payment from the acceptor of the bill, or the maker of the note, and due notice of refusal given to the defendant, *Ruston v. Aspinall*, Dougl. 680.

Cafe 27.

Colvin against Fletcher.

A plea in disability of the plaintiff cannot be pleaded after a general imparlance.

DEBT UPON BOND against the defendant, who after a *general imparlance* pleaded the statute of 1. Geo. 1. st. 2. c. 13. s. 23. and recusancy in disability of the person of the plaintiff, and therefore prayed *quod loquea prædicta remaneat inde sine die*.

IT WAS OBJECTED, upon a demurrer to this plea, that it ought not to be allowed after an *imparlance*, because pleas in disability are

S. C. 1. Stra.

520.

Dyer, 210. 1. Vent. 236. Latch, 83. 1. Sid. 29. 1. utw. 639. 1. Mod. 14. 3. Lev. 208. 334.

1. Ld. Ray. 243.

dilatory,

dilatory, and therefore should be pleaded at first ; and to prove this, the cases in the margin were cited (a).

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To WHICH it was answered, that the reason of those cases does not come up to the present case, because those were all pleas in abatement of the writ; and in such case, if it be abated, the plaintiff may have a new writ; but this is in disability of having any writ at all during his recusancy; and therefore

A SECOND OBJECTION was, that this plea is ill (b), for that it concluded *prout patet de recordo*; for the conviction of recusancy being at THE SESSIONS, which is a record of another court, it should be immediately pleaded with a *profert hic in curia sub pede sigilli*. Because the plea is but dilatory, unless the record be in the same court, for the defendant shall not have a day allowed him to bring in the record (c). In answer to this objection it will be said, that the record of a conviction is certified into this court, and being of record here need not be pleaded *sub pede sigilli*. But the words of 1. Geo. 1. st. 2. c. 13. are, "If the person to whom the oath shall be so tendered shall neglect or refuse to take the same, such justices, &c. shall certify the refusal thereof to the next quarter sessions of the county, &c. and the said refusal shall be recorded amongst THE ROLLS of that sessions, and shall be from thence certified by the clerk of the peace, &c. into the court of chancery or king's bench, &c. there to be recorded, &c. and every such person, &c. shall, from the time of his refusal, be adjudged a popish recusant convict;" so that the record remains at the sessions, and the refusal only is certified here. Besides, this certificate being made by the clerk of the peace is traversable (d), for he is no more than a ministerial officer, and therefore it is not a record to conclude the judgment of this court. And if the facts contained in the certificate may be denied, it is but reasonable to plead the certificate *sub pede sigilli*.

In debt on bond, if the defendant plead in disability of the plaintiff, that he was convicted of recusancy at the sessions for such a county for not taking the oaths prescribed by 1. Geo. 1. c. 13. the record must be pleaded *sub pede sigilli*, although it is certified into the king's bench, pursuant to the directions of the statute.

S. C. 1. Stra.
521.
Co. Lit. 128.
3. Lev. 334.
Lutw. 1100.

* To WHICH it was answered, that a record in the same court where it is pleaded need not be shewn *sub pede sigilli* (e), which I admit to be necessary where the record remains in another court. The statute 1. Geo. c. 13. creates the disability from the refusal of the oaths, and not from the time of the refusal recorded. The record is only evidence of the refusal, it does not create the disability; so that the present case is very different from the cases quoted; for there the record is the disability, as the judgment in the case of an outlawry, which is the record. If the certificate made by the clerk of the peace to this court of the refusal which was

* [44]

(a) Co. Lit. 128. 1. Mod. 14.
1. Lev. 89. 3 Lev. 343. 1 Vent. 76.
135. Yelv. 112. Lutw. 1100.

(b) The plea begins, "*quod prædictus*
" the defendant *ad lillam ipsius querentis*
" *respondere non debet.*"—NOTE to former
edition.

(c) Lutw. 17, 18. 2. Lutw. 1100.

Co. Lit. 128. a. b. Lit. Ten. sect. 211.
Bro. Abr. tit. "Record" pl. 36. 3. Lev.
Rep. 334. Com. Rep. 307. pl. 158.
where a plea of a recusant convict was
adjudged ill for this exception.

(d) Moor, 541. 1. Leon. 205.

(e) Co. Lit. 128. b.

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recorded at the sessions, be traversable so that the facts therein contained lie open to be examined, the consequence will be, that there is no need to plead the record *sub pede sigilli*, since the certificate is no record, only an evidence. Pleading the record *sub pede sigilli*, when the record does not create the disability, would vitiate the plea. When a defendant pleads "another action depending," he never pleads the record *sub pede sigilli*, because other facts are necessary to be proved, as that the actions were brought for one and the same cause. If the record make the disability, yet it does not remain in the sessions, but is transmitted into this court as effectually as if it had been removed by *certiorari*, since the act supplies a *certiorari*. It is true, the *clerk of the peace* in certifying this record is but a ministerial officer; but it is not a material objection for the plaintiff to say so, because he has an opportunity to traverse it, and to try the fact; but here the plaintiff, by demurring to this plea, has owned the fact, which otherwise ought to have been proved by the record. In the case of *Pitz-Harris v. Boinn (a)*, the plaintiff was to prove an arrest, and because he did not produce the writ, the defendant demurred upon the evidence; and it was adjudged, that the writ ought to have been produced in evidence; but the demurrer confessed the arrest, being a matter of fact, though to be proved by a matter of record.

BUT THIS WAS DENIED by the Counsel for the plaintiff, who argued, that, by the demurrer, the fact was not confessed; for the plaintiff demurred, because the defendant had not pleaded the fact, and not to the fact pleaded.

Query, Whether in a plea of *excuse* pleaded in disability, it be necessary to aver that the default was recorded at THE SESSIONS.

THE THIRD OBJECTION was, that the statute 3. Jac. 1. c. 4. gives the sessions power to make proclamation against recusants to render themselves, &c. which if they do not, and that the default is recorded, that shall be taken for as sufficient a conviction as a trial by verdict. Now the defendant has not pleaded, that any such default was recorded at the sessions; therefore this being in a criminal case, wherein the utmost certainty is required, this plea cannot be good without pursuing all the circumstances required by the act.

THE ANSWER WAS, that the statute requires the conviction should be certified into THE EXCHEQUER with such convenient certainty that the Court may award process thereon; and the defendant has pleaded, that it was certified there, which could not have been done unless the default had been recorded at the sessions.

Query, Whether a plea of *recusancy* pleaded in disability of the plaintiff, praying *quod legem non teneat sine die* be good.—Co. Lit. 128. Lutw. 17, 18. 5. Mod. 145. Salk. 297. 1. Vent. 134. 1. Lev. 26.

ANOTHER OBJECTION was, that this plea was wrong concluded, for it was, that the defendant *eat inde sine die*, when it should be *ideoque la præd. remaneat sine die quousque*; for the disability is no absolute bar, but temporary only until conformity; as an outlawry pleaded in disability of the person ought to conclude *si respon-*

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deri debet; for if after such plea the plaintiff obtain his charter of pardon, or reverse the outlawry, the defendant shall answer, for then the plaintiff is restored to the law; for the disability does not abate the writ, it only disables the plaintiff until a pardon or reversal of the outlawry (a). It is the same in the case of an excommunication, which does not abate the writ, but only disables the plaintiff from proceeding until he purchase letters of absolution (b).

To WHICH *it was answered*, that the commencement and conclusion of the plea are both proper for a plea in abatement: though *quousque* is omitted, yet the plea is good, for in many precedents of the like nature there are the same omissions; “*unde petit judicium si responderi debet*,” is the legal conclusion of a plea in disability of the person, and would be sufficient without any further prayer (c). When a plea in abatement begins properly as such, it will be good, though the defendant conclude it with praying an improper judgment; for the Court is to give a proper judgment (d). In the case of *Bilson v. Cross* (e), an action of replevin was brought in the common pleas for taking a mare; the defendant pleaded first “in another place,” and concluded with a *petit judicium et retorn. equæ præfat.*; the plaintiff took issue on the taking “in another place;” the defendant demurred, and concluded *unde ut prius petit judicium, et quod narratio cassetur*; and judgment in the common pleas for the plaintiff; and on a writ of error it was insisted, that there was a *discontinuance*, the plea being *in bar*, and the demurrer *in abatement*; but the judgment was affirmed, the demurrer being *in bar*, for “*unde ut prius petit judicium*” was sufficient, and the rest which followed was rejected as surplusage; and judgment final was given in the common pleas, the plea concluding *in bar*, though the matter pleaded was matter of *abatement*.

EYRE, Justice. “*Quod narratio cassetur*” is a conclusion in bar. The precedent in *Rast. Ent.* 319. b. is a plea of excommunication, and concludes, *quod loquela remaneat quousque*.

* [45]

THE FIFTH OBJECTION to this plea was, that the defendant did not set forth, that the plaintiff had not taken the oaths since the king's accession to the crown; for if in fact he had taken them since that time, then the statute does not extend to him, therefore this matter ought to have been specially set forth like a precedent condition, by him who is to have the benefit of it, viz. that the plaintiff was a person on whom the act attaches. * For by the statute 1. Geo. 1. c. 13. it is enacted, “That all persons who shall take and subscribe the oaths in the manner appointed by that act, are indemnified from any penalties and incapacities, &c. incurred by any former neglect.” This may be compared to a plea of a

A plea in disability, for not having taken the oaths prescribed by 1. Geo. 1. c. 13. must shew, that he is not within the proviso of the statute which exempts those from the penalty who have before taken the oaths

required.—1. Vent. 148. 1. Sid. 303.

(a) Co. Lit. 128. b. 5. Co. 109.

(b) Co. Lit. 134. b.

(c) Co. Lit. 128. a.

(d) 1. Lev. 222. Rast. Ent. 333.

Lev. Ent. 11. Thompson, 191. Brownl. E. R. 465.

(e) In the common pleas, in Hilary Term, 2. Ann.

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pardon, which must aver, that the defendant is a person not excepted in the act (a). A clause coming by way of proviso or exception, as this does, is the same in respect of pleading.

THE ANSWER was, that by the next clause in that statute it appears, that this does not extend to any person, other than such who entitle themselves to any offices or places of trust, for those only are indemnified from any incapacity incurred, and may bring any action if they have taken the oaths since the king's accession to the crown. Besides, the plaintiff ought to shew that he was excepted by virtue of the proviso, the defendant having sworn that he is included within the purview of the act.

Sed adjournatur.

And in *Easter Term*, in the eleventh year of *George the First*, THE COURT granted a *respondeas ouster*.

(a) Post. 59. Foster C. L. 87. 4. Hawk. P. C. ch. 37. f. 60.

Cafe 28.

The King *against* Selfe.

If a person be convicted of forgery at the assizes, and the judgment arrested, but, by the mistake of the clerk, not entered; *quære*, Whether the court of King's bench will order the judgment to be entered on record.

- 1. Roll. Abr. 201.
- 1. Lev. 180.
- 2. Bulst. 35.
- 1. Vent. 13.
- Bunb. 24.
- 4. Mod. 396.
- Stra. 843. 786.
- 2. Ld. Ray.
- 1518.
- 1. Salk. 47. 53.

THE DEFENDANT was indicted at the assizes for forging stamps, and appeared there upon his recognizance to answer the indictment. He pleaded *not guilty*, and, upon his trial, he was convicted; but upon a motion in arrest of judgment it was set aside.

Afterwards he exhibited a *bill in chancery* against the prosecutor of the indictment, who pleaded this conviction of forgery in bar to the bill.

The plaintiff in chancery now moved the court of king's bench, that THE RECORD might be made up with the arrest of the judgment; for that, by a mistake of the clerk of the assise, that was not recorded, nor did there any notes thereof appear in his books, but only that he was bound over by recognizance to appear at the assises, and that he did accordingly appear and saved his recognizance.

THE COURT, although this matter was evident by the records of the assises, would make no rule for the record to be made up with the arrest of judgment, because a precedent of this nature might be of dangerous consequence; and therefore desired that the cause might be put into THE PAPER, and be spoke to again, that it might be judicially determined.

The King *against* Okey.

Case 29.

ARULE was granted to shew cause why an information should not be filed against the defendant, who was a justice of the peace, for sending the prosecutor to the house of correction without a sufficient cause. An information lies against a justice for sending a servant to the house of correction for being saucy to his master.

And now he shewed for cause, that the prosecutor was a servant to L. R. who complained to the defendant, that his * said servant was saucy, and gave his horses too much corn. Andr. 272.

THE COURT held, this was not a sufficient cause to send a man to the house of correction. * [46]

So leave was given by the Court to file an information against the justice of the peace.

TRINITY TERM,

The Eighth of George the First,

I N

The Court of Exchequer.

Sir James Montague, Knt. Chief Baron,

Sir Francis Page, Knt.

Sir Bernard Hale, Knt.

Sir , Knt.

} *Barons.*

Sir Robert Raymond, Knt. Attorney General,

Sir Philip Yorke, Knt. Solicitor General,

Lord Coningsby's Case.

Case 30.

BY RULE OF COURT made on a *Thursday* in the said Term, it was ordered, that the defendant should plead in *four days* after, and the plea came into the office on *Tuesday* after, and not before, which the attorney for the now plaintiffs refused.

IT WAS INSISTED by their Counsel, that it ought not to be received; for though by the course of the court the defendant has *four days* exclusive to plead, yet such custom will not warrant five days exclusive; which was this case, because *Sunday* shall be reckoned as one of the days, as well as it is one of the *fourteen days* (a), where notice is given of a trial; it is true, pleas have been received on the fifth day, but never where the matter was contested.

THE COURT answered, that the pleas which are now put into the respective offices of the several courts were originally pleaded in court; and that the defendant may as well plead on the first as on the second day, or the fourth day; but that now by the course of

(a) By 14. Geo. 2. c. 17 s. 4. "No indictment, information, or cause whatsoever, shall be tried at *nisi prius*, or at the sittings in *London* or *Westminster*, where the defendant resides above

"forty miles from the said cities respectively, unless notice of trial in writing has been given at least *ten days* before such intended trial."

Trinity Term, 8. Geo. 1. In the Exchequer,

LORD
CONINGSBY'S
CASE.

the Court, if the defendant do not plead within *four days*, the plaintiff may sign judgment for want of a plea; but these *four days* must always be reckoned such days wherein the defendants may plead, and when the offices are open; and therefore *Sunday* is never reckoned one of those days, because neither courts nor offices are then open. And this is not like the case mentioned on the other side, where *Sunday* is reckoned one of the *fourteen days* for giving notice of trial, because a man may prepare for his journey, or come up to *London* on that day (*a*), as well as on any other day of the week.

And for this reason it was resolved, that the plea should be received (*b*).

(*a*) *Sed quære*; and see *Taſmaker v. the Hundred of Edmonton*, Stra. 406. Comy. Rep. 345.

(*b*) *Notz*, This is contrary to the case of *Aſmole v. Goodwin*, 2. Salk. 624. where it is held that, as to rules for plead-

ing, *Sundays* and *Holidays* shall be accounted as other days of the week. *Notz* to former edition.—And see S. C. 1. Stra. 86. unless *Sunday* be the first or last day, 2. Salk. 624. *Tidd's Pract.* 251. *Impey's Pract.* 5th edit. 231.

TRINITY TERM,

The Eighth of George the First,

I N

The King's Bench.

1722.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Alahd, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Mayhoe against Archer.

Case 31.

IN A SPECIAL VERDICT the case was thus : THE JURY found that *Richard Baxter* rented a farm, for which he paid three hundred pounds a-year ; that he planted *potatoes* on part of the lands which he farmed ; that he bought great quantities of potatoes to utter and sell again for profit ; and that for several years past he had dealt with several persons in potatoes at several times and places, had employed warehouses where he put in potatoes, had served several markets therewith, and had sold *great quantities* thereof for profit, and for his living, &c.

A person who rents a farm of 300l. a-year ; plants part of the land with potatoes for sale ; buys of several persons potatoes at several times and places for several years to the amount of 500l. a-year ; and sells them again for the purpose of gaining his living, is a trader within the meaning of the bankrupt laws.

Upon this special verdict there were two points raised :

FIRST, Whether the jury have found enough to make *Baxter* a trader within any of the statutes made against bankrupts.

SECONDLY, Whether a farmer who sells potatoes, though he buy several other great quantities thereof, and get his living thereby, is within any of the said acts.

S. C. 1. Stra. 513. Cro. Car. 549. Jones, 437. 3. Lev. 309. 3. Mod. 327. Ld. Ray. 287.
2. Peer. Wms. 308. 3. Peer. Wms. 298. 1. Bac. Abr. "Bankrupt" (A.).

As

MAYNOR
against
ARCHER.

March, 35.
Vent. 166. 129.
Lev. 17.
Sid. 411.

AS TO THE FIRST POINT it was argued, that the jury had found enough to make *Baxter* a trader within the statutes of bankruptcy; for though farmers or innkeepers, *quatenus* such, are not within those statutes, yet as traders they are; and here, though the jury have found that *Baxter* was a farmer, yet they likewise find, that he was a trader in potatoes, which he bought and sold; and there is a case adjudged in this very point: If a farmer buy and sell butter and cheese, he shall be accounted a trader (a). If such a trader fail to pay his debts he is a bankrupt, and by this means he is a criminal; and therefore the law shall be construed against him very strictly in favour of his creditors. If a man has several trades, whereof one is within, and another not within the statutes; yet he shall be accounted a trader, so as to make him a bankrupt; and so shall a lawyer dealing in coals. And the dealing more in one commodity than in another does not alter the case; for no man, except the trader himself, can tell in what commodity he mostly deals; therefore that trading which is the most visible means of his livelihood is to be regarded. Now in the principal case it is apparent, that by dealing in potatoes *Baxter* got credit, and probably of several persons who did not know that he rented a farm; but if he did not, yet there are sufficient words in this verdict to make him a trader, it being found that he sold several *great quantities* of potatoes, &c.

Yel. 119.
Poph. 38.
2. Lev. 80.
Sid. 38.
T. Jones, 438.

SECOND POINT. There are many great *hop-merchants* in England who have hop-yards of their own, but yet shall be accounted traders, so as to subject them to the statutes of bankruptcy. This trade of dealing in potatoes, though he was likewise a farmer, may be compared to the case where, if the plaintiff libel for tithes of faggot-wood, and the defendant suggest for a prohibition, that no tithes ought to be paid for oak-faggots, the plaintiff in his prayer for a consultation may shew, that the defendant had so sorted the faggots that it was impossible for him to take the tithes of the one without the other (b).

IT WAS ARGUED *on the other side*, that this case, as found by this verdict, is not within the intention of any of the statutes of bankruptcy, because it is not found that *Baxter* got his livelihood by the buying and selling of potatoes; for if he bought some, and had some of the growth of the lands which he rented, he is not a trader within any * of those statutes; for a farmer who bought and sold cattle was adjudged no trader so as to make him a bankrupt; nor an innkeeper who lays in malt and corn; neither shall a farmer who deals in turneps be accounted a trader.

THE COURT being divided, no judgment was given.

TWO OF THE JUDGES seemed to be of opinion, that where a man buys great quantities of wool or hops, though he has a farm, and sheep of his own, and several hop-gardens, he shall be accounted

(a) Cro. Car. 549.

(b) Backhurst v. Newton, Cro. Eliz. 347.

a trader

Trinity Term, 8. Geo. 1. In B. R.

a trader in those commodities ; and so shall an inn-keeper, if he turn corn-chandler. It is true, the jury have not found that *Baxter* got the chief part of his livelihood by buying and selling potatoes, but it is not the quantity which is material, if it is in proportion to other goods which he buys and sells ; for if a man have an orchard, and buy several quantities of fruit of other people, though not so many as he has in his own orchard, yet this shall make him a trader, and consequently subject him to the statutes of bankruptcy.

MAYNOR
against
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THE TWO OTHER JUDGES were of a contrary opinion, viz. that here was not enough found by this verdict to make *Baxter* a bankrupt ; for a farmer is no trader within any of the acts before-mentioned, *quatenus* a farmer ; and though he use another trade, yet if that is not the principal means of his livelihood, he is not a trader within those statutes. It is true, if buying and selling in any trade be the chief means of his livelihood, then he is a trader within the acts of bankruptcy ; but that is matter to be given in evidence, and found by the jury, which was not done in this case. Therefore they held, that this was an insufficient verdict, because the jury did not find that *Baxter* by buying and selling potatoes got the chief part of his livelihood, or that it exceeded his farming trade, for all that the statute requires is, that trading should be the chief matter to make him a bankrupt (a).

AFTERWARDS, in *Trinity Term*, the Counsel for the plaintiff finding the Judges differed in opinion, moved for a *venire facias de novo*, or that the Court would give leave to *mend* this special verdict, upon the affidavit of one of the witnesses at the trial, that *Baxter* bought potatoes several years, to the value of five hundred pounds a-year.

A special verdict may be amended by notes taken by the clerk at the trial, or on the affidavit of one of the witnesses deposing that the fact in which the amendment is required was proved at the trial.

Thereupon a rule was made for the other side to * shew cause why the verdict should not be amended.

The cause which they shewed was, that though this witness had sworn the same thing at the trial, yet it was without precedent to have a verdict (which is a record) to be amended by such an affidavit ; for though it was the same which was given in evidence before, yet the jury did not believe it, or probably there might be other evidence at the trial to disprove it.

* [49]

BUT THE COURT was of opinion, that a special verdict might be amended by notes taken by the clerk at the trial, or on proof of the certainty of what was then given in evidence ; and the same was ruled accordingly upon payment of costs.

S. C. Stra. 514.
1. Roll. Abr.
203.
4. Co. 52.
Cro. Eliz. 112.
150.
Cro. Car. 338.
Bunb. 283.
Stra. 1197.
1. Wils. 33.
Doug. 746.

In *Michaelmas Term*, in the ninth year of *George the First*, after the amendment, THE COURT held him a trader, saying, there was

(a) See *Newton v. Trigg*, 3. Mod. 573. *Ex parte Harrison*, 1. Brown C. R. 173. *Watkins v. Cadell*, Cook's B. L. 2067. *Buycall v. Hogg*, 3. Wils. 146. 49. *Parker v. Wells*, 1. Brown C. R. 494. 1. Term Rep. 34. *Cooke's Bank*. *Patman v. Vaughan*, 1. Term Rep. 572. *Bartholomew v. Shergood*, 1. Term Rep. 573. *Law*, 3d edit. 46 to 85.

MAYNOR
against
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now no difficulty ; and gave judgment for the plaintiff, without argument.

NOTE, This case was between two creditors of the bankrupt, for the statute 21. Jac. c. 19. gives no precedency between the creditors of a bankrupt, though the debts are due to some upon recognizances or judgments, or other specialties, and to others upon simple contracts ; for it is enacted by that statute, “ that in “ the distribution of the bankrupt’s estate no more respect shall be “ had to the debts upon judgments and specialties, &c. than to “ other debts.”

* [50]

Case 32. * The King against The Inhabitants of St. Peter in the East, in the City of Oxford.

A servant who is hired for a year, though by a boarder in an extraparochial place, and goes with her mistress into a parish on a visit to a friend, for more than forty days, gains thereby a settlement in such parish.—In an order of removal it is sufficient to say, that the pauper had intruded into the parish.

TWO JUSTICES removed *Mary Norris* from the parish of *St. Peter in the East*, in the city of *Oxford*, to the parish of *Fawley*, in the county of *Oxford*.

This order was discharged by the sessions, upon appeal, it appearing, as it is stated in the order of sessions, that the said *Mary Norris* was hired at *Christ-Church*, in *Oxford*, an extraparochial place, on the sixteenth of *May* 1717, for one year, to *Mrs. Cooke*, who then lived, and ever since hath lived, with her son-in-law, *Doctor Clavering*, canon of *Christ-Church College* aforesaid, as a sojourner or boarder ; and continued in her service there until the month of ———, in the same year ; when *Mrs. Cooke* went, upon a visit, to her son’s, *Mr. Freeman*’s, in the parish of *Fawley* aforesaid, where she continued three months upon the said visit ; that her said servant *Mary Norris* was with her at the said *Mr. Freeman*’s, and continued there in her service all the three months ; at the end of which the mistress returned again to *Christ-Church* aforesaid ; that there the year’s service expired, she having served her mistress the whole year, in pursuance of the first hiring (a) ; that afterwards, she being poor, and likely to become chargeable, went into the parish of *St. Peter*’s, *Oxford* ; and from thence she was removed, by the order of two justices, to the parish of *Fawley*, as having gained a lawful settlement there (as they apprehended) by the three months service. Upon appeal, the sessions discharged that order, being of opinion that she gained a settlement in *Christ-Church*, that being the place where the service determined. Both which orders being removed into the court of king’s bench by *certiorari*,

IT WAS INSISTED, that the sessions order might be quashed, and the order of the two justices confirmed.

(a) This state of the case is taken from the Reports of Sir James Burrow, who transcribed it from the original record, 1. Burr. Rep. 312.

There were three questions :

THE KING
against
THE
INHABITANTS
OF ST. PETER
IN THE EAST,
IN THE CITY
OF OXFORD

FIRST, Whether a hiring in an *extraparochial* place will gain a settlement ? If it do, then the hiring in *Christ-Church* and the service for three months in *Fawley-Court* gain a settlement in *Fawley*. A service in any parish for forty days in pursuance of a good hiring for a year, creates a settlement. The statutes 3. & 4. *Will. & Mary*, c. 11. and 8. & 9. *Will.* 3. c. 30. which require a service for a year, use the words “in any town or parish ;” so that a person hired in any *extraparochial* place, which is neither a town or parish, is not within the words of the statutes, for it is not to be presumed that those words would have been used, unless they were to bear some signification, and be of some effect, in the construction of the statute : the intent of the statute in using those words, and thereby excluding hirings in *extraparochial* places might be, that if a person who is insufficient live as servant in any parish or town, he may be removed, and thereby the parish will prevent the servant’s gaining any settlement ; if a contrary construction is made, a servant hired in (a) *Ireland* or *Scotland* coming over here and dwelling with his master will gain a settlement.

SECONDLY, Whether the mistress’s going on a visit into *Fawley* is such an inhabitancy as will gain a settlement for the servant, she serving there forty days ? Without doubt it would never intitle the mistress to any settlement, for the words of the statute 13. & 14. *Car.* 2. c. 12. are “coming to settle ;” and if the law be so as to the mistress, the reason equally holds as to the servant. The case of *mulier puiſne* coming to dine, &c. with *bastard eigne* was compared to this. Co. Lit. 245. b.

THIRDLY, Whether the special order be sufficient ? not shewing that *Mary Norris* was in the parish of *St. Peter’s* by intrusion ; which it was insisted was necessary to give the two justices a jurisdiction of removing her.

HAWKINS, *Serjeant*, *è contra*.

FIRST, This hiring is a good hiring within the statute 3. & 4. *Will. & Mary*, c. 11. and 8. & 9. *Will.* 3. c. 30. It is within the letter and words of them, for *Christ-Church* is said to be in *Oxford* ; so that *Oxford* must be taken to be a town, and *Christ-Church* a school in *Oxford* ; so that the hiring is in a town. But if *Christ-Church* be taken for an *extraparochial* place, yet it is within the intent and meaning of the acts ; for the terms “town or parish” are only put for example (b), and not to exclude any other place wherein a servant may be hired. Besides, these acts relating to the settlement of the poor have always received an equitable interpretation. If a servant hired in one parish, and having served there half-a-year remove with his master into another parish, and serve there the rest of the year, he will be settled in the second

(a) *Errat*, *Justice*, held, that if a man was hired in *Ireland* for a year, and after came within the year, and lived in *England* the last forty days with his master, that was sufficient to gain a settlement. *Foley*, 274.
(b) *Foley*, 273.

THE KING
against
THE
INHABITANTS
OF ST. PETER
IN THE EAST,
IN THE CITY
OF OXFORD.

Fortesc. Rep.

309.

Cas. of Set. and

Rem. 5. pl. 7.

Fol. 180

Stra. 163.

Cas. of Set. and

Rem. 50. pl. 121.

10. Mod. 430.

parish, and yet he was never hired in such second parish, which seems to be required by the express words of the act; and the reason of such construction is, because the original contract obliges the servant to go wherever his master commands him; and he is in law hired into whatever parish he goes: so the words of 3. & 4. *Will. & Mary*, c. 11. are, "any unmarried person having no child or children being hired for a year;" yet a widower having a child married is within the intent of the statute, though not within the words (a). The same exposition has been made in the certificate act, 9. & 10. *Will. 3.* c. 11. which has express negative words, "That such person shall by no act whatever, unless he take a tenement of ten pounds *per annum*, or execute some parochial office, gain a settlement:" yet a certificate person having a copyhold descended to her gained a settlement (b).

AS TO THE SECOND QUESTION: A servant going into a parish with his mistress will gain a settlement, though the mistress is only a lodger or a visitor, for the servant's settlement is independent of the mistress's, and not derivative from it, for the meritorious act which gains the settlement is the service, and that is performed by the servant. How far a visitor may gain a settlement for herself is not material in the present case; though such person may seem to be included in statute 13. & 14. *Car. 2.* c. 12. under the word "sojourner;" and by the old law "a visitor" was esteemed "an inhabitant," and obliged, as such, to find securities to the decennage (c). But in determining a servant's settlement, there is no necessity to enquire into the settlement of the master; for a servant living with a certificate person was settled, before 12. *Ann.* st. 1. c. 18. though the certificate person gained no settlement.

AS TO THE THIRD QUESTION: In the original order it is said, that the poor person intruded into the parish; it was lately adjudged, that an order of removal does necessarily imply, that the poor person was in the parish. "Endeavouring to settle" is not sufficient, without saying, "coming to settle;" because the one may be done without the other.

THE COURT held, that where a servant continues in the service of a visitor he gains a settlement (d); for he cannot be removed, unless the parish shew that he was brought or came thither on purpose that he might have a settlement; for the statute does indefinitely, and without any exception, appoint, that where the service is for forty days it shall gain a settlement; therefore it shall have a favourable construction in behalf of the poor. So if a woman be delivered of a bastard-child in such a parish, the birth gains a settlement, but not if she be sent thither on purpose for that end, or if her settlement be contested before she is delivered.

(a) See 2. *Confl's P. L.* 317.

(b) See 2 vol. of Mr. *Confl's* edition of *Bott's Poor Laws*, 681 to 697.

(c) *Fort.* 221. *Foley*, 274. and *Burn's Observations*, on the *Poor Laws*, 107.

(d) See *Alton v. Elvetham*, *Burr. S. C.*

418. *Rex v. Fall illey*, *Burr. S. C.* 722.

Rex v. Bath Easton, *Burr. S. C.* 744.

* Though the mistress in this case was a *visitor*, and no *lodger*, that does not alter the case, because the service was intirely independent of her. And as to the objection, that the statute requires that the hiring should be in a town or parish, and that this servant was hired neither in the one or the other, but in an extraparochial place, this is of no weight, for a servant may be said to be hired in every parish where he serves, as well as a man who steals cattle in one county, and drives them into another county, may be said to steal them in either county.

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against
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Fol 273.

Str. 525.

The original order was confirmed, and the order of sessions quashed (a).

(a) The Court said, that they could not take the settlement gained at *Faxley*, by a residence of forty days there, to be superseded by her subsequent return to *Christ-Church*, because it was not stated that her last residence there was for *forty days*, S. C. Str. 525. It appears by the case stated, that the pauper had resided with her mistress *forty days* in *Christ-Church* previous to her visit to *Faxley* Court, S. C. 1. Burr. 312. But where the last forty days are served in a place where no settlement can

be gained on account of its being extraparochial, the settlement is in the place where the preceding forty days were served, Rex v. Holborn, 2. Bott P. L. 483. And it is now settled, that if a servant or apprentice serve or inhabit forty days in one parish, and forty days in another parish, he gains a settlement in that parish in which he lodges the last day of the servitude, Rex v. Brightelmstone, 5. Term Rep. 188. Rex v. Undermilbeck, 5. Term Rep. 387.

Winnington against Briscoe.

Case 33.

THE PLAINTIFF bought a thousand pounds *South-Sea stock* of the defendant, on the tenth day of *August* 1720, for which he, the plaintiff, agreed to pay eleven thousand two hundred and fifty pounds, and had paid three thousand pounds, part of the money; and the defendant promised to give him, the plaintiff, *receipts* for the said thousand pounds stock, as soon as the books of the Company were open. But before they were opened an act of parliament was made, prohibiting any more *receipts* to be given out, &c. whereupon the plaintiff brought his action against the defendant for the three thousand pounds he had paid to the defendant as so much money had and received to his, the plaintiff's, use.

If a person buy so much stock, and pay a certain sum upon account and before the receipts are issued an act of parliament suppresses the receipts, the purchaser may recover his *advance-money* back again, in an action for money had and received to his use.

The question was, Whether the failure to deliver the *receipts* should subject the defendant to this action, or whether the defendant himself might not have an action against the now plaintiff for the remaining eight thousand two hundred and fifty pounds.

Paltr. 364.

1. Salk. 27.

2. Burr. 1012.

1. Term Rep.

281. 732.

2. Term Rep.

366.

3. Term Rep.

125. 127.

Lip. nass. 3.

THE COURT was of opinion, that *the receipts* being no part of the consideration, but only an evidence of the agreement between the parties, which agreement being impossible to be performed by an act of parliament intervening, shall prejudice neither party; and the subscription itself, which the defendant is still ready to give, is but an evidence likewise of the agreement; but the credit he has is the substance.

Cafe 34.

Mason *against* Bushel.

If a *trader* be sued by the addition of "yeoman," he cannot plead in abatement that he is "a *horner*."

THE PLAINTIFF brought an action against *Aaron Bushel*, late of *Honiton, &c.* "yeoman."

The defendant pleaded in abatement; that he was "a *horner*," ABSQUE HOC that he was a yeoman.

Upon a demurrer to this plea it was argued, that "yeoman" is a good addition within the statute * 1. Hen. 5. c. 5. by which it is enacted, "That in original writs where an *exigent* shall be awarded, the addition of the defendant's condition and dwelling shall be inserted." Now here there was the addition of "yeoman," which the defendant must be if he is not "a gentleman," and "a horner" may be "a yeoman," *i. e.* an ordinary or common person; and if so, then the plaintiff has election to name the defendant, either by his degree or condition, or by his mystery or trade; and this being a plea in abatement, the defendant ought to have given the plaintiff a better writ, and that directly in the same species of addition, and opposite to the addition of "yeoman," which he should have pleaded.

THE COURT was of opinion, that the defendant ought to have given the plaintiff a better writ in the same species of addition (*a*), otherwise he would take away the plaintiff's election of addition of his degree or mystery, for "a horner" and "a yeoman" are not inconsistent.

Therefore the plea was adjudged ill, and the defendant ruled to answer over (*b*).

(*a*) This was said by *Eyre, Justice*; but *Pratt, Chief Justice*, doubted, whether it was necessary to be of the same species.—*NOTE to former edition.*

556. determined on the authority of this case. Same point *Smith v. Mason*, 2 *Ld. Ray.* 1541. 2. *Str.* 816.—See also *Warner v. Irby*, 2. *Ld. Ray.* 1178.

(*b*) See *Horsepole v. Harrison*, 1. *Str.*

Cafe 35.

Phillybrown *against* Reyland.

An action lies against a *vestry-clerk* for keeping a parishioner out of vestry.

AN ACTION ON THE CASE was brought by the plaintiff, as a parishioner of the parish of *C.* against the defendant, being the clerk of the vestry there, for shutting the vestry door, and keeping the plaintiff out of the room, so that he could not come in to vote, &c.

And on a demurrer to the declaration,

IT WAS INSISTED for the defendant, that an action would not lie in this case; for if it should, then every parishioner who was kept out might have the like action; therefore to avoid multiplicity of suits (*a*), this will not lie against the defendant, unless he had set forth some particular damage done to him.

Adjournatur (*b*).

(*a*) 5. *Co.* 72. 1. *Salk.* 12. 15.

(*b*) The Court were of opinion, that the action was maintainable, *S. C.* *Str.* 624. *S. C.* post. 351.; but judgment

was given for the defendant on an informality in the declaration.—See *S. C.* post. 351. *S. C.* *Ld. Ray.* 1388.

Sheers against Lammas.

Case 36.

REPLEVIN. The defendant avowed, that T. S. being seised in fee of the place WHERE, &c. made a (a) lease thereof to the plaintiff, *habendum* for nineteen years from * Michaelmas, &c. rendering rent, &c. and afterwards devised the lands to the defendant and his heirs, and died. Then he sets forth, that the plaintiff in replevin *virtute dimissionis prædictæ*. (b) *intravit* (but did not say on what day) *et fuit inde possessionatus*, and that so much rent was due on such a day, and being in arrear he distrained, &c. and so justified the taking; and there was a demurrer to this avowry.

IT WAS OBJECTED, that the entry was laid too general, for it ought to be, "*virtute cujus quidem dimissionis*" the plaintiff in replevin "*intravit*" on such a day, "*et fuit inde possessionatus*;" because unless the particular day of his entry be set forth, he might enter before the lease commenced, and then he could be no *termor*, but a *disseisor*; and in such case the avowry ought to have been for a *trespass*, and not for *rent*; for wherever an action of debt is brought for rent reserved on a lease for years, or where a justification is made for rent arrear on a lease, it must be specially shewed, that the person from whom the rent is due entered on the day the lease commenced.

BUT ON THE OTHER SIDE it was insisted, that the allegation in this avowry is sufficient to shew, that the entry was before the distress taken.

THE COURT. It is true, there is no particular day set forth in this avowry when the plaintiff entered; but yet these words, "*virtute cujus quidem dimissionis intravit et fuit inde possessionatus*," must be intended of a legal entry by virtue of the demise; but admitting that he had actually entered before the commencement of the term, yet these words, "*et fuit inde possessionatus*," shall be taken to continue the possession afterwards. My Lord Coke, in his Commentary on *Littleton*, has a parallel case, viz. "If tenant for life in remainder disleise the tenant in possession, he hath gained a fee by such disleisin; but by the death of the disleisee, that wrongful fee is turned into a rightful estate for life by operation of law." So in the principal case, the continuance of the possession by the plaintiff shall be intended by virtue of the lease, by which he might defend himself in an action of trespass or ejectment brought by the lessor.

(a) It was made subsequent to the demise, and the main point upon the first argument arose upon its being so, viz. whether it was a total revocation of the devise during the lease, so as nothing should pass; or only a revocation *quoad* the term as to the possession only, so that the reversion and rent should, notwith-

standing, pass; and the Court held the latter.—NOTE to former edition.

(b) The lease was set forth to commence from Michaelmas, and the entry to be *ad sessionem Sancti Michaelis virtute dimissionis intravit*; so that it appeared to be a disleisin.—NOTE to former edition.

SHEERS
against
LAMMAS.

But THE COURT being not clear in opinion, no judgment was given (a).

But the following, being a parallel case, was adjudged in *Michaelmas Term* following.

(a) See *Pope v. Skinner*, Hob. 72. *v. Taylor*, Cro. Jac. 684. *Evans v. Nihart*, v. Caſſon, Hob. 128. *Rutter Crocker*, 3. Mod. 198.
v. Mills, Cro. Jac. 662. *Brooksbank*

* [54]

Case 37.

* *Macdonel against Weldon.*

Hilary Term, 9. Geo. 1. Roll 273.

AN AVOWRY for rent, under a lease dated 24 June, HABENDUM from the said 24 June, *virtute et jure* the plaintiff entered on the said 24 June, is good; for although the word "from" is exclusive, and therefore he could not legally enter on the day stated, and so he was a *disseisor*, and not a *lessee*, yet a tortious entry does not discharge the contract for the payment of the rent.

AN ACTION OF REPLEVIN was brought in the court of common pleas.

The defendant avowed, for that T. S. being seised of the place WHERE, &c. in fee, demised the same to the plaintiff for the term of one year, and from thence from quarter to quarter, *quamdiu ambabus partibus placuerit*, each party giving a quarter's warning, to commence from the feast of St. John Baptist, &c. rendering rent; that J. N. was seised in fee, and on the thirtieth day of September 1717 demised to the avowant; who, on the twenty-first day of April 1718, demised to the plaintiff a shop, &c. parcel of the premises; and that the plaintiff *virtute dimissionis prædictæ intravit et fuit inde possessionatus in et à prædicto festo Sancti Johannis*, &c.; and that the rent being in arrear at such a time, he, the defendant, distrained; and so justified the taking.

The plaintiff in his bar to the avowry pleaded, that A. B. was seised in fee, ABSQUE HAC quod prædictus T. S. fuit seisitus, &c.

The avowant tendered an issue upon that traverse.

The plaintiff demurred.

S. C. 1. Stra.
550.
8 Co. 147.
Esp. Dig. 357.

Judgment was given in the court of common pleas for the avowant.

A WRIT OF ERROR was brought on this judgment in the court of king's bench.

IT WAS ARGUED, that where a lease is made to commence *from* a day to come, the day itself is always exclusive (a); and if the lessee enter before the commencement of the lease, he is a *disseisor*, and no lessee, so no rent due on this demise. Neither can his continuing in possession after the commencement of the lease transpose it to be an estate for years, and purge the *disseisin*, because the first entry was by wrong; like an ejectment, where, if it appear that the entry was before the commencement of the lease, the defendant can never be possessed by virtue of that lease; and in this case the

(a) See Powell on Powers, p. 435 to 526. where all the cases on this subject are collected.

avowant shews, that the lessee is a disseisor, and the contract between him and the lessor is not sufficient to maintain an action at law ; this is not laid as a demise at will.

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against
WELDON.

EYRE, *Justice*, said, "*virtute cujus dimissionis intravit*" is proper and sufficient, without shewing the particular day of entry ; and if so, the entry being subsequent to the commencement of the term, will vest in the lessee the possession from the time of the commencement.

ON THE OTHER SIDE it was admitted, that the cases cited in the (a) margin are law ; but there is a difference where the lessee enters with the consent of the lessor before the commencement of the lease, and where he enters without such consent ; for in the last case, the lessee is a disseisor by the wrong done to the lessor ; but where the lessee enters with the consent of the lessor, there no wrong is done. It is true, he cannot demand any rent due before the commencement of the term ; but yet by his continuing in possession, by the consent of the lessor, who has the right, the lessor may have an action for the rent arrear. The entry does not appear to be before the term commenced. There is no time to the *intravit* ; for *in et à prædicto festo* can refer only to the words *habuit possessionem*. Besides, it is averred that he entered *virtute dimissionis*. Every quarter amounts to a new demise, it being a lease certain for a year, and then a lease at will ; and the avowry is not for rent during the year, but for a year subsequent to the expiration thereof. This dispute is only between the lessor and lessee ; so that the contract ought to be assisted as far as possible.

THE COURT held there was a difference between an *ejectment*, wherein the plaintiff is to recover his term, and an *avowry* for rent ; for in the one case the plaintiff must truly make out his title, but so much strictness is not required in the other. Besides, no act of the lessee shall hurt or impeach the contract between him and the lessor, nor shall the lessee's * entry before the commencement of the lease discharge the rent (b) ; but he shall still be liable to an action of debt for the rent arrear.

* [55]

FORTESCUE, *Justice*. As to the point of law, I am of opinion, that the avowry is sufficient. Every *disseisin* is a trespass, but every trespass is not a *disseisin*. A *disseisin* is when one enters intending to usurp the possession, and to oust another of the freehold : therefore *querend. est à judice quo animo* he entered. And it is at the election of him to whom the wrong is done if he will allow it to be a *disseisin*, as appears by the case of *Blundell v. Bough* (c), which is a very good case. To make an entry a *disseisin* there must be an *ouster* of the freehold ; either, first, by taking the profits ; or, secondly, by claiming the inheritance. In

(a) Dyer, 89. 109. 2. Roll. Abr. 420.
ro. Eliz. 766. 1. Sid. 8.

(b) Cro. Eliz. 905. 1. Roll. Abr. 605.

(c) Cro. Car. 302.—See also Doe on
the Demise of Atkins v. Herde, 1. Burr.
60. Cowp. 689.

MACDONEL
against
WELDON.

this case the entry of the lessee shall be intended only to claim his *interesse termini* ; but if he had claimed the inheritance, it can be no *disseisin invitis partibus*. Here appears no intention of either party to make it a *disseisin*, and consequently it is none. An *ejectione firmæ* differs, for there a title must be shewn, and a title to that term of which he is ejected, and which he is to recover. And besides, no continuance in possession is there alledged. It will be a hard construction to defeat the contract because the lessee entered a day too soon. And in this case, the lessee did not only enter before the day, but continued in possession after the day the lease commenced ; and that by the consent of the lessor himself ; so it shall be in his election to take the lessee for a disseisor by his tortious entry ; but by no means to be a disseisor when he continued in possession by the consent of the lessor.

Cro. Jac. 684.
Cro. Car. 302.
434.
Lev. 270.
Salk. 245.

So this avowry was held good ; and the judgment was affirmed by
THE WHOLE COURT.

Case 38. The King against Bowen Hart, the Mayor, and Bur-
gesses of Malmibury.

Saturday, 5 May 1722.

If a burges, on his admission, take the oaths of abjuration and supremacy, but unintentionally, and through the default of the town-clerk, omit to take the other oaths required by law, the Court, after an interval of eight years, will not grant an information *quo warranto* against the burges, on the application of the town-clerk.

A MOTION was made for leave to file AN INFORMATION against the defendants, upon an affidavit of the town-clerk of *Malmibury*, for that one *Gawen Hart*, of the said borough of *Malmibury*, was admitted to be a capital burges thereof in the year 1714, and had not taken the oaths of *abjuration* and *supremacy* when he was admitted.

A rule was made for the defendants to shew cause why an information in the nature of a *quo warranto* should not be filed.

And now the defendants produced several affidavits, by which it appeared, that the said *Hart* did take all the oaths which were tendered to him at the time he was admitted a capital burges ; and also that he took the oaths of *abjuration* and *supremacy* some short time afterwards, at a quarter-sessions held in *Wiltshire* ; and he himself made affidavit, that he believed he had taken all the oaths requisite for him to take at the time of the election.

IT WAS URGED for the defendant, that it plainly appears that he had not neglected to take the oaths out of any disaffection to the Government, but merely because they were not tendered to him by THE TOWN-CLERK at the time when he was chosen capital burges, he, the town-clerk, being the proper person to tender the same, and who shall be intended to know the penalty in not taking them. And though, in rigour of law, his not taking the oaths made his election void ; yet since it was merely through the neglect of the town-clerk, and who had now acquiesced without
any

any * manner of prosecution for above *eight years* (a), therefore this burgesſ ought not to be damnified, eſpecially ſince this proſecution ſeems to be carried on at the inſtance of a great perſon, who offered *Hart's* wife a thouſand guineas the night before the day of the laſt election of members to ſerve in parliament, to perſuade her huſband to give his vote and intereſt to a perſon who then ſtood candidate to be choſen a representative for the ſaid borough, which ſhe reſuſed, as appears by her own affidavit; and therefore this town-clerk was put on to proſecute the huſband.

THE KING
againſt
ROWEN HART,
THE MAYOR,
AND
BURGESSES OF
MALMSBURY.

ON THE OTHER SIDE *it was ſaid*, that the queſtion is not concerning the miſbehaviour of the town-clerk, but whether this *Hart* was duly choſen a capital burgesſ; and it ſeems very plain, that he was not, becauſe the ſtatute requires that he ſhould take the ſaid oaths, otherwiſe his election is void; and if ſo, it cannot now be made good. Neither will length of time, or any pretended ignorance of the ſtatute enable a perſon to officiate contrary to the expreſs words of the act itſelf; for if he is an uſurper, the long continuance in his office will not ſhelter him from an information, becauſe it is poſitively required by the ſtatute, that he ſhall take the oaths before he is admitted to the office.

* PRATT, *Chief Juſtice*. If he did not take the oaths at the time of his admission to be a capital burgesſ, he is not qualified to be a burgesſ, and the length of time wherein he continued to be ſo will not obſtruct the filing an information againſt him, but then after ſo long a time there ought to be a clear proof of his wilful reſuſal or voluntary neglect to take the oaths; but certainly an information ought not to be granted upon the oath of THE TOWN-CLERK himſelf, becauſe it was his fault that this *Hart* did not take the oaths; and it was likewiſe his duty to diſcover the not taking them, which he had not done for ſo many years together; therefore length of time ſhall gain a preſumption in his favour, eſpecially when, by other affidavits, it is proved, that he took all the oaths he believed to be requiſite for him to take at the time of his election. If the crown pleaſe, an information may be filed in the name of THE ATTORNEY GENERAL, but we cannot file any but upon probable cauſe, and none appearing here, the rule muſt be diſcharged.

POWYS, *Juſtice*, was of the ſame opinion.

* EYRE, *Juſtice*, of the ſame opinion.

FORTESCUE, *Juſtice*. The probability of the evidence is ſo much on the defendant's ſide, that if I were to be a juror in this cauſe I ſhould acquit him. In the caſe of *The Queen v. Jeffries* (b), concerning the borough of *Bridgewater*, he took the oath

(a) By 32 Geo. 3. c. 58. ſo any information *quo warranto* the defendant may plead in bar, that he has held the office of franchise for *ſix years* preceding the information.

(b)

THE KING
against
BOWEN HART,
THE MAYOR,
AND
BURGESSES OF
MALMSBURY.

of allegiance three days after his admission, for which an information was prayed, but denied; and he was never re-elected. After eight years, we ought not to put the defendant to a trial to prove that he took the oath of allegiance at a proper time. It has been held, that no tender of the oaths is necessary, contrary to 2. *Leo.* 242, 243.

So the information was not granted, but the rule was discharged (a).

(a) See *Rex v. Williams*, 1. Stra. 677. *Rex v. Newling*, 3. Term Rep. 310. *Rex v. Smith*, 3. Term Rep. 573.

* [57]

Case 39.

Abdelard against ———.

On an agreement to pay 50l. at 5l. a-year, and on failure to pay any 5l. then to pay the whole; an action lies for the 50l. on neglecting to pay any instalment on the time appointed for the payment of it.

Co. Lit. 292.
3. Co. 22.
5. Co. 52.
Cro. Jac. 504.
Cro. Eliz. 118.
Dyer, 113.
Jenk. 333.
Cro. Car. 350.
Moor, 13.
2. Ter. Rep. 100.
1. Wils. 80.
1. Com. Dig.
"Action" (F.).

A MAN by marriage articles was to pay fifty pounds, at five pounds a-year, until the whole fifty pounds should be paid, and in failure of payment of any five pounds, then he was to pay the whole.

* The question was, Whether, upon failure of payment of one five pounds, an action could be maintained for what was then due.

IT WAS ARGUED, that it could not until all the days of payment were past. Besides, the statute 4. & 5. *Anne*, c. . for amending the law, gives the Judges power, upon payment of principal, interest, and costs, to discharge a man after judgment obtained against him for a penalty; and this shall be deemed an equitable penalty.

THE COURT. The power given to the Court by the statute is to stay all proceedings on payment of all that is due; and in the principal case all the fifty pounds is due, and no part of it is a penalty. The defendant, by the condition of these articles, had only time for the payment of the money by parcels, as therein directed, the benefit of which condition is now lost by his breach thereof.

So the plaintiff had judgment (a).

(a) But this seems to apply only to actions of *assumpsit*, *Beckwith v. Nott*, Cro. Jac. 504. *Peck v. Ambler*, Cro. Car. 350. *Peck v. Redman*, Dyer, 113. *Taylor v. Foster*, Cro. Eliz. 807. *Cooke v. Whorewood*, 2. Salk. 164; for in the case of *Rudder v. Price*, C. B. Hilary

Term, 31. Geo. 3. it is decided, that an action of *debt* will not lie on a promissory note payable by instalments, until the last day of payment be past, 1. H. Bl. Rep. 547.—See also *Countess of Plymouth v. Throgmorton*, 3. Mod. 153.

MICHAELMAS TERM,

The Ninth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Coleborne against Stockdale.

• [58]

Case 40.

DEBT ON A BOND. The defendant, upon *oyer*, pleaded in bar, that the bond was given for money *won at play*. The plaintiff replied, that it was not given for money won at play. The defendant demurred to the replication.

Indebt on bond, if the defendant plead that it was given for money won at play, A REPLICATION generally, that it was not given for money won at play, is bad.

• IT WAS INSISTED *for the defendant*, that the replication was ill, because the plaintiff did not set forth, that the money, *or any part thereof*, was not won at play; for by the statute 9. *Anne*, c. 14. * it is enacted, "That all securities, where the whole *or any part* of the " consideration is for money won at play, shall be void;" so that it is not sufficient for the plaintiff to alledge, that the money for which the bond was given was not won at play, but he must likewise add, "nor *any part thereof*;" for if any part is for gaming money, the entire specialty is avoided by the statute.

S. C. 1. Stra. 493.
Cro. Eliz. 404.
Ld. Ray. 1550.
5. Com. Dig. "Pleader"
(F 6.). (G. 12.).

E contra. Where the plaintiff has any manner of right, he may alledge it to support his action; and where the defendant pleads but one fact, there can be but one reply.

THE

COLEBORNE
against
STOCKDALE,

THE COURT was of opinion, that the replication was too large and uncertain; therefore gave judgment for the defendant (a).

(a) The bond was conditioned for the payment of 1500l.; the defendant pleaded, that part of the sum mentioned in the condition, *scilicet* 1500l. was won by gaming, contrary to the statute, by which the bond became void; the plaintiff replied, that the bond was given for a just debt, and traversed that the 1500l. was won by gaming, *modo et forma, &c.*; and, on demurrer, it was objected, that the replication was ill, because it made the sum parcel of the issue, and obliged the defendant to prove, that the whole sum of 1500l. was won by gaming, whereas the

statute avoids the bond if any part of the consideration be on that account; and THE COURT was of opinion, that there was no colour to maintain the replication, for that the material part of the plea was, that part of the money for which the bond was given was won by gaming, and that the "*scilicet* 1500l." was only form, of which the replication ought not to have taken any notice: but judgment was given for the plaintiff, on an exception to the defendant's plea. S. C. Stra. 493. 498. — See also *Fagg v. Fagg*, Mich. Term, 1742.

Case 41.

The King against Gibbs.

An indictment for selling beer without having paid the duty, is good, although it does not say to whom sold.

S. C. 1. Stra.

497.

S. C. Sess. Caf. 263.

Andr. 175.

THE DEFENDANT was indicted for selling beer without paying the duty, and, upon *not guilty* pleaded, the cause was tried, and he was found guilty.

IT WAS NOW MOVED *in arrest of judgment*, that this indictment was insufficient, because it set forth, that the defendant sold beer without paying the duty; but did not shew to whom, or at what time it was to be paid, nor what quantity of beer he sold, and consequently a conviction upon such an uncertain indictment cannot be pleaded to any other for the same offence; neither can the defendant make any tolerable defence to such an uncertain charge (a).

An indictment for selling *divers quantities* of beer is too general.

2. Lev. 39.

4. Mod. 100.

Gro. Car. 380.

2. Rol. Abr. 80.

SECONDLY, In criminal cases the utmost certainty is required; therefore the quantity of the offence should have been set forth in this indictment, so as a conviction thereon might have been a bar to all other actions and prosecutions for the same offence.

And for this reason the judgment was arrested.

(a) THE COURT, as to this point, held the indictment good; for the prosecutor may not know the name of the person to

whom the beer is sold, and it is an offence, let it be sold to whom it may. S. C. 1. Stra. 497.

Case 42.

The King against Sparling.

A conviction for cursing and swearing on the

6. & 7. Will. 3. c. 11. must not only set forth the oaths and curses, but shew that the defendant is not any of the other characters mentioned in the act. — S. C. Stra. 497. Sess. Caf. 263.

(a) This statute is repealed by 19. Geo. 2. c. 21 which enacts, "That if any person shall profanely curse or swear, and be thereof convicted on the oath of one witness, before any magistrate, he shall forfeit and lose, *viz.* a day-labourer,

"common soldier, common sailor, and
"common seaman, *one shilling*; every
"other person, under the degree of a
"gentleman, *two shillings*; and every
"person of or above the degree of a gen-
"tleman, *five shillings, &c.*"

offender

offender forfeits two shillings for every oath (other than a servant, labourer, common soldier or sailor).

THE KING
against
SPARLING.

Upon not guilty pleaded, there was a verdict for the prosecutor.

IT WAS MOVED *in arrest of judgment*,

FIRST, That this information was too wide and uncertain, because it did not set forth, that the defendant was not a servant, common labourer, common soldier, or common sailor; for this * being in a criminal case, it shall be intended that he was one of those persons, if it do not appear that he was not; therefore that matter ought to have been specially set forth (a); like the case where the defendant pleads a pardon, he must shew, that he is a person not within either or any of the exceptions (b).

* [59]

SECONDLY, That the oaths ought to have been specified in the information, that the Court may judge of the nature of them; for otherwise the informer makes himself a judge of the fact, and that in his own cause, which shall never be allowed (c).

IT WAS ARGUED *on the other side*, that this information was good, for if the defendant was either a servant, labourer, common sailor, or soldier, he ought to have pleaded it, or to have given it in evidence at the trial.

But, for the reasons above-mentioned, the conviction was quashed. •

(a) See Andr. 175. 2. Id. Ray. 1368. 1. Burr. Rep. 150. 2. Burr. 1036.— But this question cannot now arise, for the 19. Geo. 2. c. 21. prescribes the form in which the conviction shall be drawn.

(b) Ante, 45. 4. Hawk. P. C. ch. 17. §. 60.

(c) See Rex v. Claveney, 2. Id. Ray. 1368. Rex v. Huppwell, 1. Stra. 680. Rex v. Roberts. 1. 76.

MICHAELMAS TERM,

The Ninth of George the First,

ON

A Trial at Bar,

IN

The Court of King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Burr against Davall.

Case 43.

ON the trial of an issue out of chancery, on the validity of *Sir Thomas Davall's* will, tried at the bar of the court of king's bench, the case was thus:

A will, well executed, shall not be set aside, or the testator considered *non compos mentis*, on account of the dispositions therein being imprudent or unaccountable.

6 Co. 23.
Moor, 760.
Dyer, 72.
Stiles, 417.
3. Cal. Ch. 103.
2. Com. Dig.
"Chancery"
(3. A. 1.).

Sir Thomas Davall had two sons, and being taken ill on the fifteenth day of *April* 1719, he made his will about four days afterwards, and devised his estate in *Essex*, being about sixteen hundred pounds a-year, to his eldest son, and the heirs of his body; and his *Middlesex* estate, being about seventeen hundred pounds a-year, to his youngest son, and to the heirs of his body; and that if either of his said sons died *without issue*, then the estate of him so dying should remain and go to the survivor; and if both his said sons should die *with issue*, then he devised the whole estate to *Daniel Burr* (the lessor of the plaintiff) and his heirs. Both the sons died *without issue*, and *Lady Davall*, the widow of the testator, and who was his heir at law (a), endeavoured to set aside this will.

(a) *Lady Davall* was the testator's widow, but not his heir at law; and was not at all concerned in the cause: indeed she was daughter to *Lydia Vanhattem*, niece to the two *Mrs. Davalls*, and first-cousin to *Mrs. Bovey*; but she had a bro-

ther living, *Mr. John Vanhattem*. The testator's heirs at law were the said *Lydia Vanhattem*, *Elizabeth Davall*, *Mary Davall*, and the said *Catherine Bovey*.—NOTE to former edition.

The

Burr
against
DAVALL.

The question was, Whether *Sir Thomas*, the testator, was *compos mentis* at the time he made this will.

* [60]

To shew that he was not, IT WAS ARGUED, that a father in his senses would not have left his youngest son a greater estate than he left to his eldest, who had only his *Essex* estate, and by articles in marriage he was bound to leave his younger children ten thousand pounds out of that estate, and his lady six hundred pounds a-year jointure out of that very estate. Besides, if the testator had been in his senses, the words in his will would not have carried an estate to the lessor of the plaintiff, for the devise was to his sons, &c. and that if both die *with issue*, instead of *without issue*, then * to *Daniel Burr* ; so that this being a condition precedent, the plaintiff can have no estate by this will. Neither shall the probate thereof by the executor add any strength to it in this court, since the defendant was next heir at law to the testator at that very time ; so it was held in the case of *Sir George Markham v. Lord Mountague* (a), where the will was proved by the heir at law ; yet by the judgment of this Court, confirmed on a writ of error in the house of lords, it was avoided as to the real estate.

E contra. It is no objection to say, that the testator was not *compos mentis*, because he did not dispose his estate with that prudence another man might have done, for he himself is the proper judge why he devised it in that manner ; and it is very probable, that in his last sickness he did not remember out of which part of his estate his wife was to have her jointure ; so that if this will should be set aside for the reason suggested by the defendant's Counsel, then there would be but little room left for a man in his last sickness to make any settlement or provision for his family.

Words in a will must be taken in that sense which is consistent with reason.

Then if there should be any doubt, whether the words in the will were "*dying with issue*," or "*without issue*," it ought to be taken in that sense which makes the will consistent with reason and good sense.

An objection to a witness must arise from the *voir dire* on the ground of interest, or by proof of his incompetency.

At this trial THE COUNSEL for the plaintiff objected against a witness produced by the defendant to prove that the testator was *non compos mentis*, viz. that he was to get by the success of this cause.

TO WHICH it was answered, that there were but two ways of excepting against a witness, either as to his oath, or by proving that he was a disabled person ; and this must be done on the other side.

The jury found for the plaintiff.

(a)

MICHAELMAS TERM,

The Ninth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*

Sir Robert Eyre, *Knt.*

Sir John Fortescue Aland, *Knt.*

} *Justices.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

* [61]

The King against The Inhabitants of St. Peter's, Case 44.
Oxford.

ONE Disney was hired in the parish of *St. Peter's*; in Oxford, by *Stonell*, who kept a stable of horses at *Chipping-Wickham*, for the *London* road. *Disney* served at *Chipping-Wickham* a whole year, and not in the parish of *St. Peter's*, where he was hired. Afterwards, being likely to be chargeable, he was removed, by an order of two justices, to the parish of * *St. Peter's*, where he was hired, and where his master lived; which order was confirmed upon an appeal.

such service in the parish of *B.* he gains a settlement in *B.* where the service is performed, and not in *A.* where he was hired, and his master lived.—S. C. 1. Stra: 528. S. C. Sett. & Rem., 103. S. C. Fol. 215.

Upon a *certiorari* to remove the said orders,

IT WAS MOVED, that they should be quashed, because it appeared, by the original order, that this man was settled at *Chipping-Wickham*, for there he served a whole year; and though the hiring was in *St. Peter's* parish, yet it is not the hiring, but the service, which makes the settlement.

IT WAS INSISTED on the other side, that it is more reasonable the settlement of the servant should be where his master lives than elsewhere, because the master might settle his servant in any parish where he pleased, though he did not live there himself.

If a coachmaster live in the parish of *A.* and keep horses in the parish of *B.* and hire a servant for a year in the parish of *A.* who lives during the whole time in

Fortesc. Rep. 318.
Fol. 277.
S. P. accord. in 2. Sess. Cal. 137.
pl. 125.
Fortesc. Rep. 308.
Ld Raym. 683.
Cal. of Sett. and Rem. 16. pl. 23.

Michaelmas Term, 9. Geo. 1. In B. R.

THE KING
against
THE
INHABITANTS
OF ST. PETER'S
OXFORD.

THE COURT was of opinion, that this man was settled at *Chipping-Wickham*, for it is *the service*, and not *the hiring*, which makes the settlement. This is a common case; for if a man have lands in two parishes, and keep house and live in one parish, and have a stock of cattle in another parish, and servants there to look after them, they shall be settled in the parish where they serve, and not in the parish where they were hired, and where their master lives.

So the sessions order was quashed; and that of the two justices also (a).

(a) See *Rex v. Spitalfields*, post. 309. *S. C.* 256. *Rex v. St. Agnes*, 2. Bott P. L. Bishop's Hatfield *v.* St. Peter's, *Str.* 469. *Rex v. East Ilsey*, *Burr.* *S. C.* 722. 794. 2. Bott P. L. 458. *Rex v. Hemisham*, *Fort.* 308. *Rex v. Ladbroke*, *Burr.* *Rex v. Nympsfield*, *Cald.* 107. *S. C.* 179. *Rex v. Crocombe*, *Burr.*

Case 45. The King against Fairclough and Others, Inhabitants of Lambeth.

If a rector make a verbal lease of his tithes for a year, and the lessee let the tithes to the respective landholders for sixpence per acre more than he is to pay to the rector, the lessee is the occupier of the tithes, and shall be charged thereon to the poor rate.

S. C. 1. *Str.*

525.

S. C. *Fortes.* 318.

S. C. *Sett. &*

Rem. 106.

S. C. *Foley*, 25.

THE RECTOR of the parish of *C.* by a verbal agreement, let his tithes to *Fairclough* and others, paying to him two shillings and sixpence an acre for one year. *Fairclough* and the other farmers of the said tithes let the same to the respective tenants of the lands, paying to them three shillings an acre for that year, excepting one tenant, from whom they received tithes in kind; and they paid to the rector two shillings and sixpence an acre. *Fairclough* and the other farmers were afterwards charged by the churchwardens and overseers of the poor of the said parish of *C.* by a rate towards the maintaining the poor of the said parish, upon the statute 43. *Eliz.* c. 2. as occupiers of the tithes. Upon an appeal to the sessions, they were discharged as to all excepting only seven shillings and sixpence, which they were ordered to pay for the tithes of that tenant from whom they received the tithes in kind.

All this being removed into the court of king's bench by *certiorari*,

THE QUESTION was, Who shall be accounted the occupiers of those tithes; *the farmers* who paid the rent to the rector, or *the tenants* of the lands who paid their rent for the tithes to the farmers.

MR. REEVE argued, that *the farmers* were not to be charged as occupiers; they having let the tithes to *the tenants* of the lands; that it is a settled point, that the rector is not an occupier when he lets his tithes to farm; and the reason is the same, that the farmers shall not be occupiers when they let the tithes to the landholders; therefore they, and not the farmers, may properly be accounted the occupiers; for if the farmers had made an under-lease to *T. P.* who had by virtue thereof let the tithes to the landholders, they had been the occupiers of the tithes. True it is, that in strictness

strictness the landholders have not the tithes until they are severed from the nine parts, but they have the substance thereof, *viz.* the profits, and for that reason they shall be charged as occupiers; for *the farmers* have only a dry rent out of the tithes, which may be double that value to the landholders. The farmers never bought the tithes, but pay so much for them to the rector for a year, and the landholders pay so much to the farmers; therefore they may be charged at any time of the year by the parish-officers, for the right of the tithes is in them all the whole year, and not in the farmers.

THE KING
against
FAIRCLOUGH
AND OTHERS,
INHABITANTS
OF LAMBETH.

WHITAKER, *Serjeant*, on the other side, argued, that the farmers shall be accounted the occupiers of those tithes, in regard of the three shillings an acre paid to them by the landholders; and that it is impossible for the parish-officers to charge any other than the farmers as occupiers of the tithes, because the landholders only purchase them at harvest, and therefore are no more occupiers than strangers, who may buy them at any time, if the landholders do not agree to purchase them; so that the farmers having got the value of the tithes, shall be accounted occupiers thereof; and the landholders cannot be charged with respect to the value of the tithes, because the farmers have the value; therefore the landholders cannot be occupiers when the farmers receive the profits.

THE COURT was of that opinion, that *the farmers* shall be accounted *the occupiers* of those tithes. It is true, it might be otherwise if an under-lease had been made thereof; but this is a particular case; and it appears by the rate, that the farmers have sixpence an acre profit; and if the rate be assessed on the profits of the tithes, it ought to be assessed on them, because it does not appear to the Court, that the landholders had any profit, for they may have a hard bargain. Therefore they shall rather be accounted *buyers* of those tithes than *occupiers*; for where an agreement is made for * tithes, they shall pass by way of bargain, otherwise they cannot pass at all, because they lie in grant; and therefore cannot otherwise pass than by deed, for a verbal agreement for them is good only for a year (*a*). The money which the farmers receive of the landholders for those tithes shall be accounted a *modus*; and wherever there is a *modus*, he who receives it shall be taken to be the occupier of the tithes (*b*). So where a man has a wood of standing corn, and sells the same standing, the seller shall pay the tithes for that year (*c*). In this case, *the rector* who serves the cure for two shillings and sixpence an acre shall not contribute to the poor's tax; but *the farmers*, who have such a benefit of sixpence an acre without any manner of consideration for it, by raising so much on the landholders. *

* [63]

(*a*) Hawkes v. Brayfield, Cro. Jac. 137.—But now by 5. Geo. 3. c. 17. "All leases for one, two, or three life or lives, or any term not exceeding twenty-one years, made or granted, of any tithes, tolls, or other incorporeal hereditaments, solely, and without any lands or

"corporeal hereditaments, by any ecclesiastical persons enabled to make such leases of corporeal hereditaments, are declared to be good against the lessors and their successors."

(*b*)

(*c*)

Michaelmas Term, 9. Geo. 1. In B. R.

THE KING
against
FAIRCLOUGH,
AND OTHERS,
INHABITANTS
OF LAMBETH.

PRATT, *Chief Justice*. I doubt that the farmer of the rector is to be esteemed *prima facie* occupier of these tithes : he retains the tithes, though he pays the value for them.

EYRE, *Justice*. The farmer is in this case the occupier, he having them by way of retainer, in pursuance of an agreement by parol. It would be otherwise if there had been an under-lease of them.

FORTESCUE, *Justice*. The farmer is occupier, he having them in such a manner as to make a profit of them.

Therefore the sessions order was quashed, and the rate confirmed.

HILARY TERM,

The Ninth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

* [64]

The King *against* Gage.

Case 46.

A MOTION to quash a conviction for keeping a greyhound and killing four hares, for which offence the forfeiture is five pounds, if not qualified.

The case was thus ;

The statute 5. *Anne*, c. 14. directs, “ * That if any person or persons, not qualified by the laws of this realm so to do, shall keep or use any greyhounds, &c. to kill and destroy the game, and shall be thereof convicted, upon the oath of one or two credible witnesses, by the justice or justices of the peace where such offence is committed, the person or persons so convicted shall forfeit the sum of five pounds, &c.” In this case the man was convicted upon his own *confession*, which is not within the statute ; and for that reason, if the justice of the peace had seen him kill a hare, he could not have convicted him upon his own view, because that is not such a conviction as is required by this statute, and he has no power in this case but what he derives from thence ; therefore the act ought to be pursued, and especially where it is penal, as this is, where the forfeiture relates to the conviction ; and if it be not upon oath, as the statute directs, then nothing is forfeited. It is true, if this was an offence at common

If a statute authorize a justice of the peace to convict “ on the oath of one or more credible witnesses or witnesses,” and enact, that the person “ so convicted” shall be liable to such a penalty, a conviction on the confession of the party is good.

S. C. 1. Straz. 546.
1. Burr. 609.
1. Term Rep. 320.

THE KING
against
GAGE.

See 2. Bott's
P. L. 763.

law, it might be otherwise; but being made so by a particular act of parliament, the method of conviction must be pursued as therein directed. It is like the case of removing a poor man to the parish where he was last legally settled, which by the statute is directed to be "at the complaint of the churchwardens and overseers of the poor, &c." Now if all the rest of the parish should complain to the justices, and not those parish-officers, it would not justify their making an order to remove the man, because the statute directs, that it must be made upon the complaint of the churchwardens and overseers of the poor.

ON THE OTHER SIDE *it was argued*, that the confession of the offender is within the intention, though not within the letter, of the statute; for the chief end of that law was to give jurisdiction to the justices of the peace. Now the confession of the party being the strongest evidence against himself, therefore where a justice of the peace convicts an offender upon a better and stronger evidence than required by the statute, such conviction must be good, especially since the act is only directory, *viz.* that the justices shall not convict without good evidence. As where a statute directs, that a promissory note shall be payable to one, or his order; yet where it was made payable to one alone, without the word "order," it was held good, and within the statute.

By the opinion of THREE JUDGES, this is a good conviction, for it is plain that the defendant was guilty of the offence; and if his confession had been made anywhere else, and not to the justice of the peace, yet if such confession had been proved, the justice might have convicted the offender; now here was a stronger evidence of his guilt than required by the statute; and therefore his conviction shall be good. * If a man come into court, and confess himself guilty of high treason, such confession is good against him; and even in penal laws, the intention of the legislators is the best method to construe the law: now the intention of this statute seems to be not in what method or manner of proof the offender shall be convicted, but that the conviction should be on good proof, and a better cannot be had than the confession of the party against himself. If the legislators could not foresee all the cases which might happen upon this law; therefore the conviction on oath was only directory to the justices of the peace; and by the civil law, no man is to suffer without confessing the crime of which he is accused.

So this conviction was affirmed.

EYRE, *Justice*. In the case of *The King v. Simpson (a)*, for deer stealing, upon 2. & 3. *Will. & Mary*, c. 10. where the defendant made default, and did not appear, he was convicted, and it was adjudged a good conviction, though that act did not expressly give authority to convict upon default. By the statute 22. *Car.* 2. c. 25. he who keeps a greyhound, not being qualified,

(a) *Gilb. Cases*, 282. 10. *Mod.* 248. 341. 378. *Seif. Cases*, 346. 1. *Str.* 44.

is punishable ; and the conviction is to be by oath or confession of the party ; which statute is confirmed by this of 5. *Anne*, c. 14. ; so that these laws shall both stand together. Now the statute of 5. *Anne*, c. 14. having directed that the conviction shall be upon *oath*, whereas the other is by *confession* or *oath*, it seems that the Legislature by this last act intended, that the manner of conviction by confession should still be on the statute 22. *Car.* 2. c. 25. and not on the statute 5. *Anne*, c. 14. ; for by that statute the conviction is to be upon oath ; and if a man might be convicted on this last act on his own confession, there had been no occasion to confirm the statute 22. *Car.* 2. c. 25.

THE KING
against
GAGL.

PER CURIAM, (EYRE, *Justice*, *dubitant*.) Let the conviction be confirmed.

The King against Watson.

Case 47.

UPON a motion to quash a conviction for a forcible detainer upon the view of the justices of the peace,

Quere, Whether a conviction of forcibly detaining a chamber, without describing its locality in the house, is good.

THE OBJECTION was, that it was set forth, that the defendant held a *chamber* in an house in such a street, in the parish of *St. Margaret, Westminster*, by force ; but did not alledge whose house it was, or where it was situate, nor whether the chamber was forward or backward, or how many pair of stairs were up to it ; so that if there should be two chambers in this house, the sheriff could not know of which to deliver the possession,

2. Hawk. P. C. ch. 64. s. 37.

* To which it was answered, that the Court will not intend that there were two chambers on one floor ; it ought to appear that there were two, which it did not in this case ; and as to the house in which this chamber was, that is sufficiently described.

* [66]

SECONDLY, which was the most material objection, the commitment of the defendant was to *Newgate*, and it was not alledged that *Newgate* was the *county-gaol* ; and if not, then the justices have no power to commit thither, because the statute expressly requires, that the commitment shall be to the *county-gaol* (a).

Quere, Whether a commitment by justices in *Westminster* to *Newgate*, for a forcible entry, be good.

To which it was answered, that the Court may judicially take notice that *NEWGATE* is the *county-gaol* ; and to prove this, *the Tear-Book* 16. *Edw.* 4. fol. 55. was cited.

But upon reading the record, the words in the adjudication were all in the *preterperfect tense*, when they ought to be in the *present tense*.

A conviction of forcible entry in the *preterperfect* instead of the *present tense*, is bad.

And for that reason the conviction was quashed (b).

(a) The statute 15. *Rich.* 2. c. 2. which seems to be the statute upon which this conviction was made, ENACTS, " That upon complaint made to any justice of peace of a forcible entry or detainer, he may take sufficient power of the county, and go to the place where the force is made ; and if he find any that hold such place forcibly, they shall be taken and put into the next gaol, there to abide *convict* until they have made fine and ransom to the king "

Trinity Term following, there was the like judgment for the same fault. NOTE to former edition.—And in *Rex v. Roberts*, a conviction was quashed for the same reason, 2. *Ld. Ray.* 1376. 2. *Stra.* 608. But where a conviction by a justice is grounded upon an information taken at a time past, such conviction may state, that the informer " came and gave the justice " to be informed," in the *preterperfect tense*. *Rex v. Hale*, 1. *Term Rep.* 320.

(b) In the case of *Rex v. Morgan*, in

HILARY TERM,

The Ninth of George the First,

BEFORE

The Court of Admiralty,

AT

The Old Bailey.

The King *against* Sprigg and Oakley.

Case 48.

THE DEFENDANTS were tried at THE OLD BAILEY upon an indictment for *piracy*, in sinking a ship near *the Isle of Man*.

Presumptive evidence is not sufficient to convict on a charge of piracy.

Post. 74.

THE EVIDENCE was thus: *Sprigg* bought this ship, and made the other defendant, *Oakley*, master thereof; and having freighted her, he insured five hundred pounds on the ship, and four hundred pounds on the cargo, to *the West-Indies*. Afterwards they put to sea, and run the goods upon the coast of *England*. They put to sea again; and about two days afterwards the ship was sunk; and then he protested at the next port, that both the ship and the cargo were lost.

The proof against the master was, that the day before this ship was lost, he took notice that the ship's boat was out of repair, and desired some of the men to stop the chinks therein, for that he did not know how soon they might have occasion to make use thereof: that the next day he desired one of the sailors to see how deep the water in the pump was, who in a quarter of an hour before had pumped until it was no more than two inches deep; but now, to his great surprize, found it seven inches deep; thereupon he and the rest of the ship's crew began and continued to pump, but still the water became higher in the ship, and within half-an hour was fifteen inches high: that* thereupon the sailor who first pumped, and some of the rest of the ship's crew, offered to go down into the hold, but the master would not suffer any of them to go down, nor any body to be there besides himself and *Sprigg*, who was all the time below, which was proved by the sailors; and that the water could not flow in so fast, unless the ship was bored or broken in the bottom,

* [67]

The

Hilary Term, 9. Geo. 1. At the Old Bailey.

THE KING
against
SPRIGG
AND OAKLEY.

The proof against *Sprigg*, the owner, was, that a day before the ship put to sea he bought an *augre* which was an inch and an half wide in the bore ; that the ship had *augres* enough before, and that there was no manner of occasion for so wide an *augre* ; and that he was under deck all the time the sailors were pumping, and, as they believed, boring the ship.

But the evidence being only presumptive against both the defendants, they were acquitted.

NOTE, This differs from *Malen's Case*, *post.* 74. for there the goods of another were delivered upon a special trust to carry to *Malaga*, but here the goods were the property of *Sprigg* himself, and he could not be indicted for stealing his own goods, with an intent to charge another, because there must be a felonious taking as well as a conversion ; now there could be no felonious taking, because he himself was the owner, and in possession of the goods. —NOTE to the former edition.

E A S T E R T E R M,

The Ninth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt. Justices.

Sir John Fortescue Aland, Knt.]

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

* [68]

* Wivell *against* Stapleton.

Case 49.

BY certain articles of agreement it appeared, that the plaintiff had sold to the defendant two hundred pounds *South Sea* stock for 1425l. The plaintiff covenanted, on or before the shutting of the books, to transfer so much stock, upon payment of the said sum of 1425l. and the defendant covenanted to accept the same, and *ad tunc et ibidem* to pay the money for the said stock at or before the shutting up the books for the *Christmas* dividend; and it was farther agreed, that if the defendant did not accept the said stock, the plaintiff might sell it to any other person at the market price, and return the overplus, if it sold at any higher rate; but if it sold at a lower rate, then the defendant agreed to make up the deficiency to the plaintiff. And a bond was given for the performance of the agreement.

If *A.* covenant to transfer stock to *B.* on payment of so much money, and *B.* covenant to accept such transfer, and then to pay the money, A DECLARATION in debt for non-payment of the money must aver a tender, or an actual transfer of the stock.

AN ACTION OF DEBT was brought on the bond; and the breach assigned was, that the defendant did not pay the deficiency of the said sum of 1638l. for the stock. The defendant pleaded, that he was to receive the stock, &c. and that he made a feoffment to the plaintiff of such lands in satisfaction of 1360l. then due on the said covenant, &c. but did not aver that the plaintiff accepted it

S. C. post. 314. 381.
Ante, 40, 41.
Post. 105. 292. 314. 381.
Stra. 533. 579-777. 832. 2. Burr. 899. 2. H. Bl. Rep. 128. 5 Com. Dig. "Pleader" (C. 53.). (C. 54.).

WIVELL. in satisfaction; nor make a full defence by *quando*, &c.; nor did he
 against set forth, that he made the feoffment in satisfaction of the penalty
 STAPLETON. then due, on the forfeiture of the bond.

But, upon a demurrer to the plea, the defendant had judgment in the common pleas for faults in the declaration.

* [69] * And now, upon a writ of error in the court of king's bench, the plaintiff in error insisted,

FIRST, That these being mutual covenants to pay money on such a day, &c. and the other being to transfer the stock, the default of payment on that day is a forfeiture of the bond; and there was no necessity to aver any tender. It is true, the agreement was to pay the money for the stock, but the word "for" in this case does not make it a precedent condition; viz. that the stock should be actually transferred, or a transfer tendered before the money should be paid, but that particle "for" shews what the consideration was; so are the cases of *Pordage v. Cole* (a), and of *Peters v. Opie* (b); so that if the agreement had gone no farther, these had been mutual covenants.

SECONDLY, It is true, there is a farther agreement that the plaintiff himself might transfer to another, if the defendant did not accept the stock; but that being for his own security does not alter the nature of a mutual covenant.

THIRDLY, If it should be objected that the declaration is ill, because no day or place is set forth for the transferring, or the tender to transfer the stock, the answer is, that the day is set forth, viz. that on such a day he was ready at the office of the *South-Sea-House*, to transfer, &c. and this tender at the office is like the tender of rent at a house, which is the most notorious place of the premises demised, for the office is the most notorious place of the *South-Sea-House*; and by the statute 6. Geo. 1. c. 4. which is a public law, notice is taken of that house; so that the Court will intend that was the place of tender.

FOURTHLY, But if it should not be so intended, yet the defendant having pleaded that he gave a feoffment in satisfaction of so much money then due, this is an implied admission, that the plaintiff had done every thing necessary to be done to entitle him to this action; and so is the case of *Vivian v. Shipping* (c), and of *Barnard v. Mitchel* (d). It is true, those cases were *after verdict*; but as to this matter, there is no material difference between a verdict and a demurrer, when the fault does not touch the point in issue upon the verdict, but arises on a collateral matter.

IT WAS ARGUED for the defendant, that the judgment given in the common pleas was for the faults in the declaration, viz. for not

(a) 1. Saund. 379.

(b) 2. Saund. 359.

(c) Cro. Car. 384.— See also *Palmer v. Knight*, Cro. Car. 385.

(d) 1. Vent. 114. 129.

laying an actual transfer, or a tender of a transfer, and for not assigning the day and place of such tender, according to the resolution in the case of *Lancashire v. Killingworth* (a).

WIVELL
against
STAPLETON

As to THE FOURTH OBJECTION, * admitting the plea is not good, yet if the declaration be bad the plaintiff cannot have judgment, and certainly that is not good; and if not, it cannot be helped by a bad plea, for that is expressly resolved in *Dr. Bonham's Case* (b), viz. that if the declaration be bad in substance, no implication in a plea shall mend it, which is certainly true upon a demurrer to the plea; and so is the case of *Bamfield v. Bamfield* (c), though it might be otherwise after a verdict; and the cases cited on the other side were after a verdict.

* [70.]

As to THE FIRST OBJECTION, it was said, that this declaration is ill, because the plaintiff did not alledge that he had actually transferred the stock, or tendered to transfer it, on such a day, and at such a place; and these are omissions which make the declaration ill.

As to THE THIRD OBJECTION, it is true, the plaintiff has alledged, that he was at the office in the *South-Sea-House* on such a day, ready to transfer, but that is not good; for though an act of parliament take notice of the *South-Sea-House*, and for that reason it may be intended the place of transfer, yet it does not take notice at what time it was to be done, nor of any thing to be done at the *South-Sea-House*; therefore the plaintiff should have set forth at what time he was there, and that he stayed till the last hour of the day, for that is the time appointed by the law to make a tender, unless there be a special custom to the contrary, and no such custom is alledged. But the time alone is not sufficient, without setting forth the place of tender, which was not done; and as to the transfer, the words in this agreement *ad tunc* to pay the money must relate to the transfer, and not to the day of payment; as in *Lutw.* 490. where the covenant was, that the plaintiff would accept so many shares on such a day, and *ad idem tempus* to pay, &c. there these words *ad idem tempus* were adjudged to relate to the time of the acceptance of the shares, and not to the day of the payment of the money; and this case differs from the case of *Blackwell v. Nash*, for there the money was to be paid at or before such a day.

THE COURT. The plaintiff, who sold the stock, was to transfer it on such a day, on payment of so much money, and the defendant was to receive the stock, and then to pay the money. This being the case, the question is, Whether these are *mutual covenants*.

(a) 2. Salk. 623. 3. Salk. 342. (b) 3. Co. 120.
12. Mod. 529. 1. Ld. Ray. 686. Coull. (c) 1. Sid. 336.
Rep. 116.

WIVELL
against
STAPLETON.

* [71]

And THREE JUDGES (a) held they were not, but that they were independent covenants (b); and that the plaintiff need not set forth in his declaration, that he tendered to transfer, &c. because (c) it was to be transferred upon payment of the money; so that the defendant having by this agreement made himself the first agent, he was obliged to pay the * money before the plaintiff was to transfer the stock, and then if he should deny or refuse to transfer, the defendant might have an action to compel him, because he is entitled to the whole stock; for the plaintiff had no authority to sell it until the defendant had refused to accept it; therefore he being entitled to the whole stock, the plaintiff is entitled to the whole money agreed to be paid for it, and may well maintain this action; and for this reason the judgment was reversed by the opinion of three Judges.

But EYRE, Justice, held, that the judgment in the common pleas ought to be affirmed. And first, he denied that the plea made the declaration good; for a bad plea can never mend a bad declaration, (d) especially if both are bad in substance, as these are.

And as to the principal point, he was of opinion, that these were mutual and reciprocal covenants as to the transferring the stock and payment of the money; and that upon such a covenant the plaintiff might maintain an action without laying in his declaration an actual transfer, or tender to transfer, the stock; but that this action was brought for a deficiency of sixteen hundred and thirty-eight pounds, after the plaintiff had raised three hundred and twenty-two pounds by the sale of the stock to pay himself; so that the breach was assigned upon an independent, and not upon a mutual, covenant. Now by the express agreement, such sale of the stock was not to be made until the defendant failed in payment of the 1638l. and it does not appear by this record that he did fail in payment thereof; for to shew such failure, the plaintiff ought to set forth that he did tender a transfer in due time and place, and that on the last instant of the day, because the law has made that the time of tender, unless there be a special custom to the contrary, which is not to be intended against this implication of law.

There is likewise another fault in this declaration, for by this agreement (if the defendant should refuse to accept the stock) the plaintiff had authority to sell it at the market-price; but he has not set forth in his declaration, that he sold it at the market-price, which he ought to have done, because he was to refund to the defendant the surplus of the money, after he had paid himself. It is true, the defendant was to make up the deficiency, but the plaintiff

(a) What was said by PRATT, Chief Justice, and what by FORTESCUE, Justice, are here confounded together.—NOTE to former edition.

(b) I take it, that the words "mutual" and "independent" were used as synonymous terms: and PRATT, Chief Justice, said, that these covenants were "mutual

"and independent."—NOTE to former edition.

(c) This reason was given by FORTESCUE, Justice.

(d) Quere, if he did not assert this absolutely, without adding the words in *Italic*.—NOTE to former edition.

has laid the non-payment thereof as a breach of this agreement, without shewing what right he had to it ; and he cannot have a double remedy, viz. one for non-payment of the deficiency, and another for the breach of the mutual covenant. * He agreed, that the plaintiff had assigned a breach of the mutual covenant, but that he did not rely on it, but went farther, by saying, that he paid himself three hundred and twenty-two pounds ; therefore he should shew, that he had a right so to do ; so that this breach which he had assigned was only as a general breach, and introductive to his action, the real cause whereof was the second breach assigned, viz. the non-payment of the deficiency. Now if there was not a sufficient tender of the transfer, the plaintiff could not entitle himself to this action upon the second breach assigned, because he did not lay a tender in proper time and place ; for if the office at the *South-Sea-House* was not a proper place of tender, or to transfer the stock, then the plaintiff could not bring his action for this deficiency ; and for aught that appears to the Court, the defendant was ready to pay the money at the time and place, because it does not appear that the plaintiff was there at the last instant it could be tendered. But if there be any thing particular, as that a transfer can only be made between certain hours, as between eleven and one o'clock, it must come on the defendant's side.

WIVELL.
against
STAPLETON.

* [72]

But afterwards, in *Michaelmas Term*, in the eleventh year of *George the First*, the judgment was reversed, by the opinion of PRATT, Chief Justice, and two other Judges.

PRATT, Chief Justice, delivered the resolution of the Court. The averment of the tender is insufficient, being alledged to be made at the *South-Sea-House*, without shewing that to be the usual place for transferring ; the plea is also insufficient ; so that the question rests only on the declaration. If it appear that the plaintiff was intitled to sell the stock, then the declaration is good : the covenants are mutual, so that there is no necessity to aver any transfer of the stock or tender thereof ; the defendant covenants to accept before the shutting of the books ; the time of payment is not tied up by the covenant to the time of acceptance ; the time of acceptance is any time before the shutting of the books ; so is payment, which is the true construction of the words *ad tunc et ibidem solvere* ; for otherwise the defendant, by non-acceptance of the stock, might prevent his obligation to payment ; covenant for payment is not expressed to be *super transfectionem*, but *in consideratione præmissorum*, which is intended the covenant to transfer ; and this construction seems the intent of the parties, which is the true rule of construction.

This judgment of reversal was afterwards reversed in the house of lords ; for that the residue of the money was not due to the plaintiff until he had made a good and legal tender of the stock, and the defendant had made default : and the plaintiff not having shewn this in his declaration, it was adjudged, that he had not laid a sufficient breach therein.

Afterwards

WYLLIE
against
STAPLETON.

Afterwards the plaintiff brought another action, and laid a proper breach, and the defendant pleaded the former record in bar, to which the plaintiff demurred. *Sed quære quid inde venit.*

Case 50.

Lovelock against Sorrel.

In covenant for not repairing, brought against an assignee of an assignee, the plaintiff need not set forth the intermediate assignments.

v. Stra. 229.
Doug. 314.
Ep. Dig. 303.

A LEASE was made to W. R. and afterwards the lessor brought an action of covenant against the assignee of an assignee, for not repairing, but did not set forth the intermediate assignments. The defendant pleaded, that this lease did not come to him by any mesne assignment of the lessee. To which plea the plaintiff demurred.

IT WAS INSISTED, to maintain the demurrer, that the plea was too general, and altogether immaterial; for if the defendant had the land by any assignment from the original lessee, he is subject to this covenant; therefore he should have pleaded, that the lease did not come to him, and not that it did not come to him by any mesne assignment; and so is 1. *Sand.* 238. 285. and 2. *Sand.* 188.

ON THE OTHER SIDE it was argued for the defendant, that in an action of covenant against an assignee of a lessee, the plaintiff should specially set forth all the intermediate assignments, and shew how the defendant came to the land, and not as assignee generally.

* [73]

* But this was denied by THE COURT, and adjudged, that the declaration was good against the defendant as assignee general, because it may often happen that the lessor may not know all the intermediate assignments.

There was no judgment given this Term.

In the *Trinity Term* following an objection was made to the declaration, that the plaintiff had declared on a lease for years *adhuc venturam*, when by the very record it appeared, that the lease was expired by the effluxion of time; therefore he had declared on another lease.

See 2. Mod.
217.
Show. Rep. 155.

But THE COURT gave no judgment as to this point; but said, that in all actions of trover the usual form of declaring was, that the goods came to the defendant *per inventionem*; but it would certainly be an immaterial plea if the defendant should deny the finding, as in *Sand.* 238, &c.

Case 51.

Anonymous.

Re facias will not lie for costs without shewing that the judgment was affirmed in THE EXCHEQUER-CHAMBER.

A JUDGMENT was given in the king's bench; and, upon a writ of error brought in THE EXCHEQUER CHAMBER, that judgment was affirmed; and now the plaintiff in the action brought in THE EXCHEQUER-CHAMBER. Post. 315.—Cro. Eliz. 587. Cro. Jac. 636.

S. Sta. 1199.

brought

brought a *scire facias* for the costs he had sustained by the delay of ANONYMOUS the execution.

And IT WAS OBJECTED, that it ought not to be allowed.

FIRST, Because it was brought in *London*, and not in *Middlesex*, where it ought to be brought ; and for a default in the writ itself,

SECONDLY, Because it did not set forth what became of the case in THE EXCHEQUER-CHAMBER, that is, it did not shew that the judgment was affirmed ; for if it was not, then the plaintiff has no right to the costs.

ON THE OTHER SIDE it was answered,

FIRST, That a *scire facias* may be laid in any county where the original action was brought. So if an action should be brought on the original judgment, such action might be laid in any county, and the *scire facias* may be brought where that judgment was obtained.

And, SECONDLY, all that is necessary to be alledged in it is, that judgment was given for the plaintiff, and is not satisfied.

THE COURT. It is true, an action of debt upon the original judgment, or upon a recognizance, may be laid in any county, but a *scire facias* must always go into that county where the execution on the original judgment should be made.

* Afterwards, upon reading this *scire facias*, it was, as before, observed, that it did not set forth what became of the cause in THE EXCHEQUER-CHAMBER, and certainly the plaintiff cannot have this writ without shewing what became of the judgment removed by this writ of error ; and it is unreasonable he should have it for costs in delay of execution, without shewing that the judgment was *affirmed* in THE EXCHEQUER-CHAMBER.

* [74]

E A S T E R T E R M,

The Ninth of George the First,

A T

The Old Bailey,

UNDER

A Special Commission,

BEFORE

Sir Henry Penrice, *Knt. Judge*

O F

THE HIGH COURT OF ADMIRALTY;

AND OTHERS.

The King *against* Mason.

Case 52.

THE DEFENDANT, who was master of a ship, was indicted and tried upon several indictments at THE OLD-BAILEY; before SIR HENRY PENRICE, *Judge of the Admiralty*, and several other civilians, and before some Judges of the common law assisting them; and this by virtue of a commission under the great seal, according to the statute 28. *Hen. 8. c. 15.*

Evidence that the captain of a ship tampered with the carpenter to knock her on the head; ordered a fire to be made in the cabin; threw the buckets overboard; and made the crew drunk; will not maintain an indictment for feloniously burning the ship.

THE FIRST INDICTMENT on which he was tried was, for maliciously and piratically burning a ship, to the great damage and defrauding both the owners and insurers, against the peace, and against the form of the statute (a).

The fact upon the trial appeared to be as follows:

THE SHIP was laden with linen at *Rotterdam*, and bound for *Malaga*, in *Spain*. The defendant, when he received the *bill of lading*, was ordered by the merchants and owners to put in at *Lynn Regis*, in *Norfolk*, in order to get a *Mediterranean pass* for his

(a) See the 22. & 23. *Car. 2. c. 11.*; *c. 12.*; and 11. *Geo. 1. c. 29. s. 6.* the 1. *Anne*, *st. 2. c. 9.*; the 4. *Geo. 1. 1. Hawk. P.C. c. 48. s. 1.*

THE KING
against
MASON.

safety. It was proved by one witness, who was the carpenter of the ship, that the defendant, when he came near to *Dartmouth-Bay*, tampered with him to know what he would take to knock the ship on the head. It was proved by another witness, that the defendant gave the ship's crew some bowls of punch on the day the ship was burnt, and made them all drunk ; and afterwards ordered this witness to make a fire in the cabin, where there was none for a month before that time ; which he did when the defendant and most of the crew were going ashore, except two who were very drunk ; and that there was but one bucket belonging to the ship, which the defendant had ordered a sailor to fling overboard the day before the ship was burnt. The two sailors who remained drunk in the ship made oath, that they were sleeping there until the ship was so much on fire, that they could not relieve her nor themselves, but that they were carried off by another ship's boat then in the harbour.

* [75]

* Upon this evidence the presumption was very strong, that the ship was burnt by that fire which was first made in the cabin ; but this being only presumption, and no direct proof, the defendant was acquitted.

If goods be laden on board a ship, with a *special trust* to deliver them at a certain place, the captain is not guilty of piracy by fraudulently converting them to his own use.

THE DEFENDANT was afterwards tried upon another indictment for *piracy*, and stealing the goods which he had at *Rotterdam* on shipboard, and consigned to *Malaga*.

The evidence against him was, that the goods were delivered to him, and that afterwards he got both the ship and the cargo insured at *London* and *Rotterdam* ; and when he came to the coasts of *England*, he privately run all the goods ; and when the ship happened to be burnt, he came to *Dartmouth*, and protested both ship and cargo as burnt and lost (according to the method of protesting insured ships), though the cargo was privately run by him as before-mentioned, which was proved by several witnesses. The owner of the goods proved the property and the delivery, &c.

THE COUNSEL for the king laid it down for a rule, that all acts which amount to *felony* at land will amount to *piracy* at sea ; that upon this evidence it plainly appeared, that the defendant had run the goods *animo furandi*, which if done at land would be felony ; as for instance, if goods are delivered to a carrier, and he steal them *animo furandi*, it is felony, and so is this piracy ; for it appears, by his protesting that the ship and cargo were burnt and lost, that he designed to cheat both the owners and insurers. It is true, if the master of a ship run goods, with an intention to cheat the king of the duties, this is no piracy, though the goods should happen to be seized as forfeited to THE CROWN for not paying the duties. But here by the defendant's protesting the goods to be lost, when they were not, but privately run by him, this must be with an intention to cheat and defraud the owners, for it was done *animo furandi*, and his intention makes it piracy, as a felonious intent makes the action felony.

The

THE DEFENDANT produced an instrument in writing, under the merchant's hand who freighted this ship (as he pretended, by which he had authority to run the goods, as he should * find opportunity. But upon enquiry and proof this seemed to be a forgery, for the merchant, on oath, denied his signing the instrument; and the witness to it being now produced to prove the signing it, made oath, that he did not know the merchant therein mentioned, but that the defendant and another were at a public-house in *Rotterdam*, and sent for this witness, who came, and then the defendant told him, that the other person there present was his merchant, and that he sent for him to be a witness to the power his merchant gave him; and thereupon the instrument being ready drawn, that other person signed it, and this witness attested it. All which gave room for a presumption, that he intended the running the goods before he left *Holland*, *animo furandi*.

THE KING
against
MASON.

* [76]

But notwithstanding this evidence, the Judge of the Common Law, who assisted the Judge of the Admiralty, directed the jury to acquit the defendant, for that the goods were delivered to him upon a *special trust* to deliver them at *Malaga*, and that it could be no piracy to convert those goods in a fraudulent manner until that special trust was determined, no more than it could be felony in a carrier by converting of goods delivered to him to carry to such a place before that special trust was determined. And this appears to be the law of *England* by concurrent resolutions in several law-books (a).

THE COUNSEL for the king thereupon insisted, that though this was not piracy before the *special trust* was determined, yet the breaking open some bales of linen on board this ship made it piracy, for this was a conversion with force and *animo furandi*; and that it would be felony in a carrier to break open any boxes delivered to him, and to convert them *animo furandi*, for such a conversion by force is felony, though the special trust was not determined.

* But THE COURT held, there was a difference between opening bales of linen and breaking open the locks or nails of boxes by a carrier; and that this was no piracy.

* [77]

(a) 3. Inst. 107. Hale's Pleas of the Crown, 61. Staundf. 25. 13. Edw. 4. 9. Kelynge, 81. The case in *Kelynge*, 81. was thus: A man came to *Smithfield Market* to sell a horse, and a jockey coming thither to buy a horse, the owner delivered his horse to the jockey to ride up and down the market to try his paces, but instead of that the jockey rode away with the horse; this was adjudged felony. And certainly it is felony, but different from *Mason's Case*, because the horse was not delivered to the jockey upon any

special trust, as the cargo was to *Mason*, but was only a general delivery, and no more than the common case of a shopkeeper shewing or delivering goods in his shop to his customers, where a conversion of such goods is certainly felony. But the delivery of goods upon a *special trust* is commonly public and notorious; and therefore if the party convert them before that trust is determined, it is not felony, because he may have a proper remedy by an action of *trover* to recover damages.—NOTE to the former edition.

Easter Term, 9. Geo. 1. In O. B.

THE KING
against
MASON.

THE JURY, thereupon, acquitted the defendant of this indictment.

The defendant was afterwards tried upon a third indictment for a cheat, in committing the acts aforesaid, and was found guilty; and fined, and imprisoned till he paid the fine.

An exemplification of a custom-house entry of goods abroad, is not evidence to prove the goods delivered to the captain.

NOTE, To prove the delivery of the goods to the captain, an exemplification of the entry of them made in the custom-house books at *Rotterdam*, attested by a *public notary*, and sealed with the public seal there, was offered in evidence.

But THE COURT would not admit this exemplification to be given in evidence.

Bull. N. P. 225. 227.

E A S T E R T E R M,

The Ninth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Coke *against* Allen.

Case 53.

ERROR in the court of king's bench, upon a judgment given in the court of common pleas.

A warrant of attorney may be filed at any time before the defendant pleads.

The error assigned was, for not filing a *warrant of attorney*, as required by the statute 4. & 5. *Anne*, c. 16. for the amendment of the law, by which it is enacted, "That the attorney for the plaintiff shall file his warrant the same Term in which he declares, " and the attorney for the defendant in the same Term in which he " appears."

S. P. accord, in Fitzgib 191. Stra. 526. 2. Stra. 807. 1. Com. Dig. "Attorney" (B. 3.).

But this was over-ruled; for if the plaintiff's attorney file the warrant at any time before the defendant has pleaded, it is sufficient to maintain the judgment, though by the said statute he may be fined if he do not file it in the Term when he declares; but the not filing it in manner as aforesaid does not impeach the judgment.

Case 54.

Spackman against Hufsey.

A declaration in an inferior court, that the defendant became indebted upon an account stated within the jurisdiction, is sufficient.

THE PLAINTIFF declared in THE MARSHAL'S COURT upon an *assumpsit* *computasset infra jurisdictionem*, &c. and had judgment.

And now, upon a motion to set it aside, it was insisted, that *the account* does not alter *the duty*, for that may arise in *York*; and no other consideration being laid to intitle the Court to any jurisdiction, the judgment ought not to stand.

BUT IT WAS ADJUDGED, that *the account* was sufficient to give the Court a jurisdiction (a).

(a) See *Emery v. Bartlett*, that an action in an inferior court, upon an account stated, need not state that the sums in arrear, concerning which the parties accounted, were in arrear within the jurisdiction of the court, 2. Ld. Ray. 1555. S. C. Stra. 827. *Stanion v. Davis*, 6. Mod. 223.—But see *Trevor v. Wall*,

that in an *assumpsit* in an inferior court, for money had and received, the declaration must alledge, that the money was had and received within the jurisdiction, as well as that the defendant promised to pay within it, 1. Term Rep. 151.—See also 1. Show. 395. 2. Show. 246. 2. Wils. 16. 1. Ld. Ray. 211. Cowp. 20.

TRINITY TERM,

The Ninth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

* [78]

* Tucker *against* Goldburne.

Case 55.

AN ACTION OF DEBT was brought upon an assignment of a bail-bond taken by the sheriff, who had arrested the defendant upon a *capias*, &c.; and upon a demurrer to the declaration,

Indebted upon the assignment of a bail-bond, the process on which the arrest was made must be set forth.

IT WAS OBJECTED, that the plaintiff had not set forth the *capias*, or the *teste* or a return of any * *capias*, as he ought to have done (a); and the court of common pleas being of that opinion,

A WRIT OF ERROR was brought in the court of king's bench.

But the judgment of the common pleas was affirmed, for it is the *capias* which gives life to the bond.

(a) Cro. Eliz. 647. 1. Sid. 159. and Saxby v. Kirkus, in the king's bench, in Hilary Term, 1754, Sayer, 116.

Moor *against* Thompson.

Case 56.

IN AN ACTION OF TRESPASS brought by the plaintiff in the court of common pleas, for entering on the plaintiff's land on the twenty-fifth day of *March*, in the fourth year of *George the First*, with a *continuando* of the said trespass the twenty-fifth *March*, Where the jury may sever the damages for which the plaintiff hath declared in

Trinity Term, 9. Geo. 1. In B. R.

Moore
against
Thompson.

in the sixth year of *George the First* (which was two years), &c. *ad damnum*, &c.

The defendant pleaded, that the lands were copyhold, and the freehold of one *Green*.

The plaintiff replied, and, admitting them to be copyhold, set forth a surrender made to him, and that he was admitted a whole year before he brought this action of trespass, &c. *viz.* on the seventh day of *April*, in the fifth year of *George the First*.

The defendant in his rejoinder denied the surrender : issue thereon.

At the trial there was a verdict for the plaintiff ; and the jury gave damages for that year only, *à prædicto* the seventh day of *April*, in the fifth year of *George the First*, whereas the plaintiff had declared for two years damages.

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And now upon * a writ of error brought, it was insisted, that though the plaintiff had a verdict, yet if the jury did not find enough it is an insufficient finding ; and here they had found damages only for one year, where the plaintiff had declared for two years damages, and the jury cannot sever the damages for which the plaintiff had declared.

THE COURT. Had the damages been assessed generally, it had not been good, because upon the record it appears, that the plaintiff ought to recover no damages until the seventh of *April*, in the fifth year of *George the First*. because till then he hath no title to the lands. If the damages had been assessed, they might have been released.

The judgment was affirmed,

Case 57.

Colebrook against Diggs.

Tuesday, 2 June 1723.

If a plaintiff in debt on bond for the payment of money obtain judgment in the king's bench, and the judgment is affirmed on error in the exchequer-chamber, the defendant, on bringing a writ of error to the house of lords, must give fresh bail, according to 3. Jac. 1. c. 8. or the plaintiff may take out execution. — S. C. 1. Stra. 527. 1. Salk. 97. 1. Com. Dig. "Bail" (N.). 5. Com. Dig. "Pleader" (3. B. 12).

ERROR IN THE EXCHEQUER-CHAMBER upon a judgment given in the court of king's bench for sixteen hundred pounds, in an action of debt on bond conditioned for payment of money only, and there the judgment was affirmed.

A writ of error was afterwards brought in THE HOUSE OF PEERS. The plaintiff in the original action was about to take out execution against the defendant, for not entering bail, according to the statute 3. Jac. 1. c. 8. s. 1. (a), which enacts, " That no execution shall be stayed by any writ of error or *superfedeas* bringing a writ thereupon, in any action of debt upon a single bond, or upon any obligation with condition for payment of money only, or for must give fresh bail, according to 3. Jac. 1. c. 8. or the plaintiff may take out execution. — S. C. 1. Stra. 527. 1. Salk. 97. 1. Com. Dig. "Bail" (N.). 5. Com. Dig. "Pleader" (3. B. 12).

(a, Perpetuated by 3. Car. 1. c. 4. s. 4. ; and see 16. & 17. Car. 2. c. 8. perpetuated by 22. & 23. Car. 2. c. 4.

" rent,

“rent, or upon any contract in the courts of record at *Westminster*,
 “or in the counties palatine, or in the courts of great session ;
 “unless such person, in whose name such writ of error is brought,
 “with two sureties, such as the court wherein the judgment is
 “given shall allow of, shall first be bound unto the party for whom
 “judgment is given, by recognizance in double the sum recovered,
 “to prosecute the writ of error with effect, and also to pay (if the
 “judgment be affirmed) all debts, damages, and costs, adjudged
 “upon the former judgment, and all costs and damages to be
 “awarded for delay of execution.”

COLERIDGE
 against
 DICKS.

MR. REEVE, *for the defendant*, insisted, that having already entered into such a recognizance in the court of king's bench before the writ of error was allowed, he is not obliged by this statute to give a new recognizance of bail, having already pursued the statute by giving bail in that court where the judgment was given, and it would be very hard for him to be bound in two recognizances for one and the same matter. This case differs from the case of *Tilly v. Richardson* (a), for there the original judgment was obtained in the court of common pleas, and bail given there on removing the record into this court; and when a new writ of error was brought on the judgment in this court, new bail was given, because no recognizance was before entered into in this court; for this court could take no notice of the recognizance given in the court of common pleas; but if any new bail ought to be given, it ought to be in THE EXCHEQUER-CHAMBER, where the judgment is affirmed.

ON THE OTHER SIDE it was insisted (b), that this matter is so plain that it was never controverted. Upon a writ of error in parliament, the plaintiff in error must alledge the judgment in the court of king's bench to be erroneous, as well as the judgment in THE EXCHEQUER-CHAMBER; for after an affirmance in THE EXCHEQUER-CHAMBER, this court awards the execution; for that court remits the cause with the proceedings: and this writ is brought in delay of execution of the judgment; but the first recognizance does not extend to the costs sustained in THE HOUSE OF PEERS, but only to the costs for delaying the execution by the first writ of error; so that if a new recognizance should not be given, the costs upon the writ of error in parliament, if the judgment should be affirmed, would be lost. It is true, the statute enacts, “That bail shall be given in the same court where the judgment was given;” but this is only explanatory, and intended that it should be given where the judgment was of record.

* [86]

THE COURT. After an affirmance in THE EXCHEQUER-CHAMBER, we award execution, which we ought not to delay, without taking new security for the damages and costs. This act is a remedial law, and is to be extended by equity. It is considered

(a) 1. Salk. 57. pl. 2. S. C. 2. Ld. Raym. 840. S. C. 7. Mod. 120. (b) By WHITAKER, Sergeant.

COLEBROOK
against
DIGGS.

as a judgment and record in this court, after it is affirmed in THE EXCHEQUER-CHAMBER, for the writ of error returnable in parliament is always directed to the chief justice of this court, and he carries up the record. And there is no manner of inconveniency by entering into two recognizances ; for both are the same in respect to the plaintiff in error, because by the late statute he has a proper remedy, if the plaintiff in the original action take out execution for more than is due ; but it would be very inconvenient for him to be delayed by a writ of error, and to have no sufficient security to make satisfaction for his loss. There is a case (a) where an executor was obliged to give bail in *the chamberlain of London's court*, and likewise bail for the same thing in *the spiritual court*, and so double bail ; and this was warranted only by a particular *custom in London*, which is not to be favoured so much as a general statute made for the advancement of justice.

So the party was ruled to put in new bail in the court of king's bench, else execution awarded.

(a) Luck's Case, Hobart, 247.

Case 58.

Wilkinson against Matthews.

In what case a person may be arrested on an *escape-warrant*.

UPON A MOTION to discharge the person taken upon an *escape-warrant* after he had obtained a *day-rule*,

IT WAS RULED, that the defendant should shew cause on such a day.

And afterwards upon that day he shewed for cause, that the taking upon this warrant was about eight of the clock in the morning, and long before the Court was sat, so that the plaintiff could not have a *day-rule* at that time.

But this was over-ruled, because in this case there shall be no fraction of a day ; and the opinion of the late CHIEF JUSTICE HOLT was now mentioned, that where a person is taken upon an *escape-warrant* * who had obtained a rule for that day, that the prosecutor should be committed ; and that it was sufficient if the party had delivered his name in writing to the clerk the night before the day he moved for a *day-rule*, as soon as the Court should sit.

But it appeared in the principal case, that *the day-rule* was obtained after the party was taken upon the *escape-warrant*, on purpose to avoid the commitment by virtue of that warrant ; and that his name was not delivered to the clerk the night before, but sitting the Court.

IT WAS RULED, that he should continue in custody (a).

(a) See *Bradshaw's Case*, where a rule was made on a constable to shew cause, &c. for arresting one who had a ticket, and her name was in the petition of the day ; but the rule was never drawn up.—NOTZ to former edition.

The King *against* Ackworth and Others.

Case 59.

UPON A MOTION for *an attachment* against the defendants, upon an affidavit of their withdrawing a witness from giving evidence at the assizes in a trial had there upon an information against certain smugglers;

On a motion for *an attachment*, if the defendant positively deny, by his affidavit, the facts contained in the affidavits of the prosecutor, the rule shall be discharged.
Post. 110.

It was shewed for cause why an attachment should not go, that the defendants had affidavits to disprove the charge made against them by the affidavits of the plaintiff; thereupon those affidavits were now read in court: and it was affirmed to be the constant practice, that though the affidavits produced by the plaintiff were very full as to the charge, yet if the person denied such charge by as plain and positive affidavits, in such case he should be discharged, and *an attachment* should not go; and that if such affidavits were not true, then the plaintiff had a proper remedy, which was by indicting them for perjury. And because a man shall not be kept in custody, and deprived of his liberty, by *an attachment*, therefore this is the only case where a negative oath shall be preferred to an affirmative.

- All which was agreed by THE COURT; but that the present case differed; for the defendant did not by his affidavit plainly deny the fact with which he was charged.

MICHAELMAS, TERM,

The Ninth of George the First,

I N

The King's Bench.

1722.

O N

A Trial at Bar,

BEFORE

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

* [82]

* The King *against* Layer.

Case 60.

Wednesday, 31 October 1722 (a).

CHRISTOFER LAYER being committed to THE Tower for high treason, in compassing the death of the king, and an indictment having been found against him at *Rumford*, in *Essex*, before special commissioners of *oyer and terminer*, and being removed hither by *certiorari*, was afterwards brought up by *habeas corpus* to the bar, and arraigned upon the indictment. The Court will not order a prisoner indicted for high treason to be unfettered at the time of his arraignment; or because he is confined in THE Tower; but during his *trial* his irons ought to be taken off, unless there be danger of a rescue or escape.—S. C. 6. St. Tr. 229. S. C. 8. St. Tr. 570. S. C. Fortescue 396. S. C. Foster 198. 231. 245. 2. Inst. 325. 3. Inst. 34. *Mirr. ch. 5. f. 54.* 2. Hale, 219. Kely. 10. Staundf. 233. 4. Hawk. P. C. c. 28. f. 1.

(a) See the statute 24. Geo. 2. c. 48.

HUNGERFORD

THE KING
against
LAYER.

HUNGERFORD and KETTLEBY, who were assigned his Counsel, moved, that *the irons* might be struck off his legs, and instanced the cases of *Gordon, King*, and others, where it had been so done before they pleaded ; and argued, that he was not obliged to plead until his fetters were taken off (a) ; and that it was the opinion of the late CHIEF JUSTICE HOLT, that it ought to be so done ; that this person was the first *Tower* prisoner that ever had irons on his legs ; and that there were no such instruments there until now brought from NEWGATE.

THE PRISONER himself moved, that *the irons* might be taken off before he pleaded, because lying in his clothes all night, and other inconveniencies occasioned by those irons were so painful to him, that he being deprived of his rest had not the free use of his reason ; that he hoped to have a fair trial as allowed by the law, without any undue severities ; and he complained of some ill usage as he was bringing to the hall.

THE COURT answered, that they could not take notice of such ill usage, because they did not know by whom it was done ; and as for *the irons* being taken from his legs, it is true, that it was done in those cases cited by his Counsel, but it was where the prisoners had pleaded to their several indictments, and were to be tried on the same day ; and that it would be to no purpose to insist on this matter * for so little a time as the prisoner now had to stand at THE BAR ; and as for taking them off in THE TOWER, the Court would make no order, because, if they did, it might be an excuse to his keeper if he (the prisoner) should escape ; therefore it must be left to his keeper's discretion how to use his prisoner, especially since he had already attempted to escape.

THE COURT then recommended it to the prisoner's Counsel, that if they had any exceptions to the indictment, they would now shew what those exceptions were.

The Court will not quash an indictment of high treason for a mis-recital of the special commission under which it was taken.

Whereupon they made the exceptions following : Mispelling, false *Latin*, nonsense, and surplusage, and that there were insignificant and insensible words in the very commission, by virtue whereof this indictment was found, as *plenius veritat* (b), which words cannot be construed to any manner of sense.

But as to the fault objected to the commission by virtue whereof this indictment was taken, it was answered and resolved, that this Court has no power over it, so as to quash the indictment. And though the objection is, that *plenius veritat* cannot be construed in any manner of sense, yet by transposing the words it may be made good sense. They are in the recital of the commission of the caption of the indictment, and must refer to the former words,

(a) *Cranbourn's Case*, 3. Inst. 34. *Mirror*, c. 5. f. 1. *Kelynge*, 10.

(b) The words are, "*Et per quos vel per quem, cui vel quibus, quando, qualiter,*

" *et quomodo, et de aliis articulis et circum-*
"*stantiis præmissa et eorum quolibet, seu*
"*eorum aliquod vel aliqua, qualitercunque*
"*concernent. plenius veritat.*"

"*ad inquirend.*" They are inserted in the form of a commission published in a treatise allowed by all the Judges, called, "A Collection of all Statutes relating to High Treason, composed for the Assistance of the Justices in Scotland."

THE KING
against
LAYERS.

BUT HUNGERFORD said, that the authority of that book was denied by all the Judges, except PRATT, *Chief Justice*, in the case of *Mathews (a)*; for it was resolved, that a panel of the jury delivered to the prisoner charged for high treason, without any additions or places of abode, is sufficient, contrary to that treatise (*b*).

FIRST as to the mis-spelling. The prisoner is called in the indictment *Christophorus*, with an *e*, when it should be with an *a*, as *Christophorus*.

An indictment is good, although it name the defendant *Christophor* instead of *Christophcr*.

It was answered, that they did not know what his name was, and probably he might be baptized by that name; but if he was not, it might be pleaded *in abatement*; and though the lexicons and dictionaries might warrant *Christophorus* to be the right name, yet the other might likewise be a name of baptism.

THE COURT. As to the mis-spelling of the prisoner's name, he may plead that matter in abatement, for he may be as well * known by the name of *Christoferus* as by the name of *Christofer*: and this objection deserves no other answer.

* [84]

SECONDLY, It was objected, that the words in this indictment are, "That he (the prisoner) *compassavit, imaginatus fuit, et intendebat ad sacram personam domini regis capiend. seiscind. et imprisonand.*;" now here the conjunction copulative "*et*" should have joined the word "*intendebat*" to the same mood and tense, but instead thereof it is joined to verbs of the preterperfect tense, &c.; therefore it makes incongruous *Latin*, and improper in an indictment, and makes it vitious.

"*Compassavit, imaginatus fuit, et intendebat,*" will not vitiate an indictment of treason.

THE COURT. It is not true. The verbs are not all in the same tense; but though they are not, and the *preter tense* is coupled with the *preterperfect tense*, yet that is not material, and shall not make this indictment naught; either word is sufficient to charge the defendant with the intent of compassing; either *overt act* is sufficient.

THIRDLY, It was objected, that the words "*ad seiscind.*" the "king" is an insignificant word, not known in the law, or in any *Latin* author; and for these reasons this indictment ought to be quashed, and the rather, because all forms of indictments, especially in high treason, ought to be very certain.

A charge of treason *capiend. seiscind et imprisonand.* the king, is good.

7. Rep. 5.

(a)

(b) The late Mr. J. Foster observes, that the little tract intituled, "The Method of Trial of Commoners in Cases of High Treason," published in the year 1709, by order of the house of lords, directeth, "That the addition of dwelling-places and professions of the jurors

"be inserted in the copy of the panel; but that the act (27. El. c. 7.) doth not require that exactness, and that the practice is otherwise." Fost. Disc. High Treason, chap. 3. p. 230—See *Mathews' Trial*, 9. St. Tri. 680. No. 42. so *quare* which is the book alluded to.—NOTE to former edition.

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against
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THE COURT. As to the words "*ad seiscind.*" it being only an overt proof of the design, it is well enough if any proof be made of an overt act of the things laid in the indictment. Besides, it is not a word unknown in the law, for it is used every day in the court of exchequer, where *seisfire facias* are words in a writ sent to the sheriff, and he returns *seisfiri feci*. "*Seiscind.*" is a proper word; but without it there is sufficient to charge Mr. Layer.

On an indictment for high treason, if a misnomer be pleaded in abatement, and the attorney-general demur to the plea, the Court will not allow the prisoner time to reply, or to join in demurrer.

THE OBJECTIONS being over-ruled, he was demanded to plead.

The prisoner pleaded *misnomer in abatement*, and his plea was received, read, and filed.

Afterwards he was sent back to THE TOWER, and ordered to be brought again to THE BAR on Saturday, on the morrow of *All Souls*; and being accordingly brought up on that day, namely, the third of November, THE ATTORNEY-GENERAL demurred to the plea, and prayed that the prisoner might join in demurrer.

THE COUNSEL for the prisoner desired time to reply, or to join in demurrer, and the rather, because in *Fitz-Harris's Case* (a) four days were given by this court, which is some proof that it is the course of the court to allow time to plead in such cases.

THE CHIEF CLERK of the crown office being thereupon asked what was the custom of the court in this matter, answered, that in *criminal cases* there were precedents where, upon demurrer, time was given to join in demurrer, but never in *capital cases*.

THE COUNSEL for the prisoner thereupon argued, that if time was given in criminal cases, *a fortiori* it should be allowed in capital cases.

THE KING'S COUNSEL replied, that no instance could be given where, in capital cases, a day had been allowed to join in demurrer, because the prisoner can do nothing else; therefore where he pleads in abatement, he should always be prepared to maintain his plea. As to *Fitz-Harris's Case*, it is rather an authority against the prisoner than for him, for that was a plea to the jurisdiction of this court, to which there was a demurrer, and *Fitz-Harris* immediately joined in demurrer. It is true, in the present case life is concerned, but not so immediately; and this plea is so frivolous, that it scarce deserves an answer, it being only a pretended mistake of a letter in the prisoner's name of baptism, when there are uncontrollable authorities that it is spelt both ways; and notice was given of this demurrer yesterday, and a copy thereof sent to each of his Counsel, so that greater indulgence hath been shewed to him than formerly to *Fitz-Harris*, or to *Lord Preston*, who upon his trial at THE OLD-BAILEY, before the Chief Justice HOLT, for high treason, pleaded his patent of peerage, but was denied time to produce it.

THE COUNSEL *for the prisoner* admitted this ; but the reason why time was denied to produce the patent was, because *Lord Preston* pleaded, that it was dated at *St. Gorman's*, and it would have been a dishonour to the court to proceed in the examination of letters patents granted by the late *King James* after his abdication, because every act done by him afterwards as king was absolutely void.

THE KING
's
LAWYER.

THE COURT upon the whole matter held, that time was never yet given in *capital cases* (a) to join in demurrer, and said, that what was now offered as a plea was first offered as an exception to the indictment, and that the prisoner's Counsel were then ready to argue it as an exception, and why not now, when it is a plea. It is true, they have mentioned *Fitz-Harris's Case* as an instance where four days were allowed by this court for him to join in demurrer ; but that is so far from being a case in point, it widely differs from the present case ; for there the cause of delay and contest was between the prerogative of THE KING and the privilege of THE HOUSE OF COMMONS, which were extraordinary things, and to be well considered before *Fitz-Harris* could be tried ; now in the present case the prisoner cannot withdraw his plea without leave of THE ATTORNEY-GENERAL, who having demurred to it, the prisoner has nothing more to do than to join in demurrer, and all the proceedings in such cases are *instant*.

THE PRISONER answered, that he did not affect any unreasonable delays, but that he was willing to withdraw his plea *in abatement*, and to plead *in chief*, though he had a joinder in demurrer ready engrossed. He did accordingly withdraw it, and pleaded by the name in the indictment, *Christopherus*.

THE PRISONER moved for a rule, that his wife and sister might be permitted to visit him under such restrictions which the Court should think fit. And a rule being about to be made, that his wife might come to him, being first searched, but as to his sister, that it should be left to the discretion of the keeper,

If a person be in custody on a charge of high treason, the court of King's bench may, by RULE, order the gaoler to permit certain persons named in the rule to visit him.

IT WAS OBJECTED against this rule, by the Counsel for the king, that the like had never been made. It was denied to *Fitz-Harris*, and only an intimation given to the keeper, that it might be expedient for his friends and relations to visit him.

* But THE CHIEF JUSTICE said, that it was true the wife of *Fitz-Harris* was denied to come to her husband, probably because she had misbehaved herself, by throwing his plea into the court when it was not signed ; and it was now affirmed, that there had been rules made by this court of the like nature ; but if there had

* [86]

(a) In *capital cases* no rule is given either to plead or to join in demurrer ; but the prisoner being at the bar is obliged to answer immediately, for all the proceedings

are *instant* ; and therefore capital cases differ from other criminal cases not capital.—NOTA to the former edition.

Michaelmas Term, 9. Geo. 1. In B. R.

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against
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not, yet it was in the power of the Court to make a rule to oblige the keeper to permit the prisoner's friends to come to him under proper restrictions.

And a rule was made accordingly for his wife to be admitted, in the presence of the gaoler, and after being searched.

If an indictment be removed into the court of king's bench by *certiorari*, the trial must be on the *quarto die post* of the *venire facias*.

PENGELLY, *King's Serjeant*, on the fifteenth of *November*, moved the Court to appoint a time for the trial.

THE COURT. The process must be returnable at a common day, the indictment being removed by *certiorari*; the last return in this Term but one is in eight days of *St. Martin*, and then the trial may be the *quarto die post*, which will be the twenty-first of *November*.

The prisoner desired a further day.

THE COURT said, that cannot be, for the jury cannot be adjourned beyond the return.

A *habeas corpus ad testificandum* ought not to issue, without an affidavit that the party is a material witness.

Portesc. Rep.
396.

THE PRISONER then moved (notice having been given) for a *subpœna ad testificandum* to be directed to his witnesses, and for an *habeas corpus ad testificandum* to bring up Lord Orrery and Lord North and Grey, who were then prisoners in THE TOWER for high treason.

THE COURT. Such writs have formerly been granted of course at a Judge's chambers; but the inconvenience may be so great, that an affidavit ought to be first produced that they are material witnesses, otherwise, at such a trial, under such a pretence, there may be a general gaol-delivery of all prisons in the kingdom.

But SIR PHILIP YORKE, *Attorney-General*, the next day, consented to such writs without any affidavits.

THE COURT, however, made a general rule, that no *habeas corpus* of either side, civil or crown, should be granted hereafter, without affidavit that the parties to be *subpœna'd* were material witnesses, and bade the officers take it down; and the Court declared that they might, on the circumstances of the case, refuse to grant such writ of *habeas corpus*.

Quære, If a defendant on an indictment of high treason is intitled to copies of papers.

THE PRISONER likewise moved for a rule, that he might have copies of all the papers in the keeping of THE SECRETARY OF STATE which were intended to be produced in evidence against him.

To WHICH it was answered, that it was time enough for such a motion.

So he was remanded to THE TOWER, and his trial ordered to be on *Weanesday* the twenty-first of *November*.

A prisoner shall not be tried in irons.

At which day he was brought to the bar and tried, his irons being first taken off.

THE

THE JURY were called by the clerk of the crown-office, and the prisoner was desired to except against as many as he thought fit, so far as the law allowed.

THE KING
against
LAYER.

THE PRISONER thereupon moved, that ~~the~~ panel might be called over, that he might know who appeared, and who not, which, after some opposition, was done.

A prisoner may have the whole panel called before he challenges.

THE CLERK then called over the whole panel.

THE PRISONER challenged thirty-four *peremptorily*, and two more *principally*, for saying in *Effex*, that they hoped to see him hanged; and he challenged four more for want of sufficient freehold within the county, within the meaning of the statute 7. & 8. Will. 3. c. 32. (a) by which it is enacted, "that they must have ten pounds *per annum*;" which challenges were allowed. But, *PER CURIAM*, being servant to the king, or farming anything under the king, is no cause of challenge.

In treason, the prisoner may challenge *peremptorily* and for cause.
Co. Lit. 156.
Moor, 12.
3. Inst. 27.
4. Hawk. P. C. c. 43 f. 5.

THE ATTORNEY-GENERAL then challenged eight for the king. But he is not by law obliged to shew any cause of such challenge before they have gone through the panel, and the jurymen not challenged are sworn (b): for if those who appear are not enough to make up a jury, then those eight may be sworn.

The king may challenge without shewing cause before the panel is perused.
Moor, 595.
4. Hawk. P. C. ch. 45. f. 3.

But the jury was full without them, and now sworn.

The first witness produced against the prisoner was one *Stephen Lynch*, who deposed, that he and the prisoner did often consult together, and propose methods how to seize THE TOWER, and the Lord Cadogan, the Lord Townshend, and Mr. Walpole (c), and THE BANK OF ENGLAND, and to give the arms in * THE TOWER to the prisoners and others in the Mint, and to the mob, and likewise to seize the king and the prince; and that on the twenty-fourth day of August last the prisoner read a declaration, and gave it to him (this witness) to read at the sign of the Green-Man, in Laytonstone, in *Effex* (d), which was to be sent all over England, as soon as they had seized the city of London; that he (this witness) was the person appointed to seize the Lord Cadogan, and that he was to have as many men as he should choose for that enterprise; and that accordingly he (this witness) and the prisoner went to view that lord's house, to whom the prisoner pretended, that he had an authority to sell an estate, &c.; and farther he deposed, that he got ten guineas of the prisoner to defray his charges until they could put their designs in execution, which was to be done as soon as the soldiers, who were then encamped in Hyde-Park, should break up; that these consultations were carried on between the prisoner and this witness for a whole month; yet the prisoner never told him who was to be the general

An accomplice in high treason is a competent witness, although no ground be previously laid by other witnesses to give verisimilitude to his testimony.

* [87]

(a) See also 4. & 5. Will. & Mary, c. 24.

(c) Sir Robert Walpole.

(b) See 3. Edw. 1. commonly called an Ordinance for Inquests, 4. Hawk. P. C. ch. 43. f. 2.

(d) This was the overt act which was laid in the county of *Effex*.

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against
LAYER.

officer, though he went with him to the *Lord North and Grey's* house, but not a word spoken there of their scheme, where this witness was introduced by the prisoner, and received very kindly.

The next witness produced against the prisoner was a soldier, *Serjeant Plunket*, who deposed, that in *July* last he met the prisoner in *Lincoln's-Inn-Fields*, who there told him of this scheme, which was then in agitation, to bring in *the Pretender*, and if he, this witness, could procure some soldiers who were then disbanded to list themselves in *the Pretender's* service, then they should be able to regulate the mob upon any insurrection, and told him, that the *Lord N. and G.* was to be their general, and that he would head the insurrection; that the prisoner then gave him half-a-crown, and promised to send him more money to list men; that afterwards he received half-a-guinea of one *Jefferies*, a non-juring parson, who told him, that *Mr. Layer* was in the country, and had sent that money to him; that in a little time afterwards he had a letter left at his lodging by the said parson, that *Mr. Layer* was come to town, and thereupon this witness went to him at the *Castle-Tavern*, in *Drury-Lane*, where *Layer* told him, that he had sent a whole guinea by the parson, and wondered that he had received but half, and no more, and then he the prisoner told this witness the whole design; and that some of the greatest * men in the kingdom would come into the scheme; and though he (this witness) acknowledged that he could neither write or read, yet he remembered the contents of the letter which he had received three months since, and which one of his comrades did read to him.

* [88]

The next witness was *Mrs. Mason*, who deposed, that the prisoner left a bundle of papers with her for safe custody, which was sealed with A HEAD; that the bundle so left with her was not opened until the messenger seized it at her lodging; and that the bundle now produced in court is the same which was left with her by the prisoner, she having marked it in a particular manner; and the messenger deposed, that it is the same bundle he seized at her lodging.

Then the messengers who apprehended the prisoner deposed, that there were two fuzees, two cases of pistols, two swords, two muskets, and about forty or fifty cartages of powder and bullets in the prisoner's house, made ready for any enterprise; and one *Colonel Huske* deposed, that the fuzees had such wide bores that they would swallow a musket-ball, and serve very well for that purpose.

Then *Mr. Squire*, the messenger, and others, made oath of the manner of the prisoner's escape from him out of his (the messenger's) house, and of his being retaken in *Saint George's Fields*, in *Southwark*.

Mrs. Mason farther deposed, that she had received several letters by the order of the prisoner, which were directed to one *Mr. Fountaine*, which letters were delivered by her to the prisoner, and

opened and read by him ; and she being now asked whether she could read, she replied she could not, but that her landlady told her to whom those letters were directed.

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Then one *Mr. D'Oyley* deposed, that some papers which were in that bundle were, as he believed, of the prisoner's hand-writing; for that he, this witness, was acquainted with his hand, he being his clerk about fourteen years since, and that he had received a letter from the prisoner about five years past, which he believed was written by him.

The papers were produced to be read.

THE COUNSEL for the prisoner opposed their being read, because *similitude of hands* is no evidence ; and some cases were cited to prove that matter.

Papers found in the custody of a person may be read in evidence against him on an indictment for HIGH TREASON, although they are not in his hand-writing.

But this was over-ruled by THE COURT, who were of opinion, that if these papers were not written by the prisoner, yet being found in his custody, they ought to be read ; and so it was resolved in *Lord Preston's Case (a)*.

* Then the papers were delivered to the clerk of the crown, and he read a scheme, consisting of fourteen articles, how to surprise THE TOWER, how to provide arms, where to rendezvous, and several other articles, &c. Then he read ten notes signed by the Pretender himself "*JA. Rex,*" and those were to raise money for this undertaking.

* [89]

Then several letters were read, all written by *Sir William Ellis*, who is secretary to the Pretender, and subscribed "*Eustace Jones,*" and directed to *Mr. Fountaine*, which letters were deciphered by some other papers found in this bundle, viz. that paragraph "to provide able workmen," was explained "to provide able soldiers," and "the ablest hands of *Barbara Smith*" was explained "the army;" that "*Eustace Jones*" is "*Sir William Ellis,*" and "*Mr. Atkins*" is "*the Pretender;*" that "*Mr. Burford*" is "*the Earl of Or—y,*" and "*Mr. Simonds*" is "*the Lord N. and G—y.*"

The meaning of papers found in the custody of a person indicted for treason may be explained by other papers on the same subject.

THEN *Mr. Stanian* and *Mr. Delehay*, who were present when the prisoner was examined before the Council at THE CLOCKTOWER, offered to give evidence of the prisoner's confession there.

A confession made at the Clocktower by a prisoner charged with treason may be given in evidence on the trial.

But this was opposed by his Counsel, for that he had not signed any confession, and probably some unguarded words might drop from him at that time which might amount to a crime if given in evidence.

THE COURT thereupon declared, that it was no evidence, but that the witnesses should be examined as to what he committed there, as a corroborating circumstance of the evidence already given.

(a) 6. State Trials, 279.—See also Foster, 193. and Burr. Rep. 644.

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against
LAYR.

Those witnesses being sworn, deposed, that the prisoner confessed he had been at *Rome*, and that he was kindly received at THE PRETENDER's court, and that he prayed to have credentials to his friends in *England*, which was denied; but that he obtained leave that THE PRETENDER and his spouse would stand godfather and godmother to the prisoner's child; and that, after he returned into *England*, he applied himself to the *Earl of Or—y* to stand proxy for THE PRETENDER, which he refused; then he made application to the *Lord N— and G—y*, who, with the late *Dutchess of Or—d*, stood proxies.

They farther deposed, that being asked what he knew of THE PRETENDER's declaration, he answered, that he only knew some heads of it.

A WOMAN was then produced, who deposed, that she saw the prisoner at *Rane* in *July* last was twelvemonth, and that he was kindly received at THE PRETENDER's court.

* [90]

The defendant
on a trial for
high treason may
call witnesses to
discredit the tes-
timony of the
witnesses on the
part of the
crown.

* This being the substance of the evidence against the prisoner, he now made his defence.

AND FIRST, the *Lord North and Grey* said, that he never saw *Stephen Lynch*, but only when he came to his house with the now-prisoner, where he stayed one night, and no longer, and that he found by his discourse, that *Lynch* was a scandalous fellow; and coming afterwards to his house when the prisoner was taken, he was forbid to come in.

There were several other witnesses who gave an infamous character of *Lynch*, *Plunkett*, and *Mason* (*viz.*), that they would say and swear any thing, and that they would hang a man for two-pence. And two of the witnesses for the prisoner swore positively, that *Lynch* told them, that he had got some money from the bastard-daughter of one of the first men in *England*. Another witness deposed, that *Lynch* told him, that he was unfortunately brought in to impeach the prisoner, and that he had rather fight any six men in *London* than do it; but that being engaged in it, he must go through, and that he had nothing to say against any person but against the prisoner, and nothing against him but talk. And another witness deposed, that *Plunkett* told her that the money he received of the prisoner was rather for charity than for any service done to him formerly, and that he (*Plunkett*) could hardly make the prisoner remember their former acquaintance.

Papers in the
prisoner's hand-
writing may be
compared with
other papers
found in his
custody.

Then two witnesses were produced, who deposed, that the papers which were sworn by *Mr. D'Oyley* to be the prisoner's hand-writing were not so. Then *Mr. Paxton* produced a paper found in the bundle, which the prisoner's witnesses owned to be his hand-writing; and this was compared with the other papers which they had sworn not to be of his hand-writing.

Whereupon the prisoner observed to the jury, that *similitude of hands* was a very weak evidence; and said, if such evidence, and such witnesses, should be allowed it was impossible for any man to be safe.

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LAYER.

* [91]

SIR PHILIP YORKE, *Attorney-General*, replied, setting forth the greatness of the offence, and the plainness of the proof, and made several remarks on the evidence on both sides, and said, that the indictment was proved beyond contradiction; and that the witnesses produced to give a character of *Lynch*, &c. wanted witnesses to their own characters; and that one of them (*viz. James Darcy*) had sworn he knew the prisoner * here last winter, when he did not come into *England* till last *April*. That the witnesses seemed to be people raked out of THE MINT for a certain purpose, but that the witnesses for the king were persons of credit, and to prove them so several credible persons were called: the first was a *vintner*, who deposed, that he had known *Lynch* about four months, in all which time he was frequently at his house, and had behaved himself very honestly; and being asked whether *Lynch* owed him any money, he replied, that he did owe him 8l. 15s. 6d. which he paid not long since. There were likewise several officers called to *Plunkett's* character.

On a trial of high treason, if the defendant calls witnesses to impeach the character of the witnesses for the crown, other witnesses may be called on the part of the prosecution to support their credit.

PRATT, *Chief Justice*, summed up the evidence on both sides, and concluded with directing the jury, that if they believed there was an *overt-act* of treason in the county of *Essex*, and that it was proved by *Lynch*, and confirmed by the confession of the prisoner; and if there was any *overt-act* in another (a) county, as his lifting or employing any to lift or engage men in THE PRETENDER'S service, they should find the prisoner guilty.

In high treason, an *overt act* must be proved in the county in which the indictment is laid.

S. C. 6. St. Tr. 292.

2. Hawk. P. C. ch. 46. f. 34.

And they being gone from the bar, returned in the space of half-an-hour, and brought in their verdict "Guilty."

THE PRISONER was then remanded to THE TOWER, and ordered to be brought again to the bar on the *Tuesday* following, being the twenty-seventh day of *November*, which was done.

The irons of a person convicted of treason shall be taken off when he is brought up to receive judgment.

HIS COUNSEL then moved again, that his irons might be struck off, which, not being opposed, was likewise done.

THE COURT directed, that if they had anything to offer in arrest of judgment, this was the proper time, and they should be heard.

On a person's being brought up to receive sentence on a preparatory to a

conviction of high treason, the Court will allow the indictment to be read to him in motion in arrest of judgment; but they will not allow the *venire facias* to be read.

(a) On an indictment for high treason, in conspiring the death of the king, if several *overt-acts* are laid, and some are proved by one witness to be done in the county where the party is indicted, and others are proved by another witness to have been committed in a different county,

that evidence is sufficient to maintain the indictment; they are two witnesses of the same species of treason within the meaning of the law. *Kelynge*, 51. *Stafford's Trial*. *Five Jesuits Trial*.—NOTE to former edition.

Thereupon

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against
LAWER.

Thereupon they moved, that the *venire facias* for summoning the jury might be read.

This was opposed by the King's Counsel as a thing without precedent ; therefore, if it should be now allowed, it might be a precedent hereafter ; not that they feared to have it read, but would not make a precedent to give the courts any trouble both now and hereafter ; and the rather, because what was now desired did not concern the merits of the cause, but was a collateral point, and of no great weight.

THE COURT said, they would not deny the prisoner anything to which he was entitled by law, and which might do him any service in his present circumstances ; but that if what was now

* [92]

(a) desired was never yet granted to the greatest persons under the like misfortunes, there could be no reason to grant it to him. * It is true, the indictment is a thing on which the merits of the cause depend, and therefore the Court admitted it to be read to the prisoner, but not the *venire facias*, for that was never yet allowed.

If a *venire facias* on an indictment of treason be returnable " in eight days " of St. Martin, it cannot be objected in arrest of judgment, that the defendant was not tried on the day of its return, or the *venire facias* continued to the day of trial.

The objection to it, if it had been read, was, that it is returnable in eight days of St. Martin, and the prisoner not being tried on that day, in such case, if it is not continued to the day of trial, they are out of court, and so this jury had no more authority to try the prisoner than those who were never returned on the panel, because the *discontinuance* makes the trial erroneous, for wherever there is a *discontinuance* of any return, the whole proceedings are wrong.

THE COURT asked the clerk of the crown, how the practice was in such cases.

The clerk of the crown answered, that it was as in the present case, and that he never saw a *venire facias* continued, because the jury are always supposed to be in court till the four days are past ; and there never was any continuance within the four days.

THE COUNSEL for the prisoner replied, that it might be so in civil or criminal cases, but not in capital causes, because in such the law requires the utmost certainty.

CURIA contra. There is a day of appearance on the *venire facias*, and the proceedings are like those on an original. In case the jury do not appear on the *venire facias*, so that a *distringas* is awarded, it always bears *teste* the *quarto die post*, after the return of the *venire facias*. The jury is never bound to appear till the *quarto die post* ; they may adjourn the jury over to any day before the next return in the Term ; but no entry is ever made on record of such adjournment, for the proceedings are entered to be at the

(a) The prisoner, at common law, was not entitled to demand anything to be read but the indictment, and 7. Will. 3. c. 3. hath made no alteration as to the process. See Fost. Cr. Law, 221.—NOTE to former edition.

return of the writ. *Reekwood's Case* is so ; for on a commission of *oyer* and *terminer* there is no *quarto die post*, nor day of appearance, but the day of the return of the writ. And the Court was of opinion, that if this was a good objection, then many proceedings in the like cases would be set aside.

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AGAINST
LAYTON.

THE PRISONER then observed, that all the proof against him at the trial was a design to levy war, but that it never was actually levied ; and that a design or intention to levy war is not treason (a). It is true, an intention to kill the king is treason, if proved by some overt act ; and here the indictment is for a design to kill the king ; and the overt-act which they would apply to it is a design to levy war, which, he said, was not an overt-act of his design to kill the king.

An intention to
levy war is an
overt act of a de-
sign to kill the
king.

BUT THE COURT was not of that opinion. This very point being settled above a hundred times ever since the case of the Regicides, so lately as in the case of *The King v. Gordon*, in the first year of *George the First*, and ought not to be permitted to be disputed, where an intention to levy war was adjudged to be an overt-act of a design to kill the king.

THE COUNSEL for the prisoner answered, that in *Francia's Case* (b) it was only argued, whether an intention to levy war should be given in evidence as an overt-act of an intention to kill the king, which is not the present case, because now that very matter is moved in arrest of judgment, where all the stress must be laid upon it that possibly may be laid ; which was not requisite in *Francia's Case*, because he was acquitted.

But this objection was over-ruled.

• [93]

The next thing in arrest of judgment was, that the overt-act in *Effix* was not well laid in this indictment, for it was, that he (the prisoner) "*malitiosè et proditoriè publ cavit quoddam scriptum, &c. continent. et purportant*" (inter alia) "an exhortation, incitement, and promises of rewards, &c." when the very words, and not the purport of them, ought to be laid in the indictment ; as it was resolved in *Doctor Sacheverel's Case* (c), that in all accusations, the words supposed to be criminal ought to be inserted (d).

An indictment
for high treason,
stating, as an
overt act of
the king's death,
that the defend-
ant, at such a
place, "malice-
ously and
traitorously
did publish a
certain mali-
cious, sediti-
ous, and
traitorous
writing, con-
taining and
purporting (a-
mong other

CURIA contra. The words themselves need not be set out ; it is sufficient to shew the substance or effect of them.

And by EYRE, Justice, the opinion of the Judges in *Doctor Sacheverel's Case* was a great surprize to WESTMINSTER HALL, being never so adjudged in any book ; and HOLT, Chief Justice, held, that an indictment specifying the words or the substance was good, without stating the very words of the publication. — *Ld. Raym* 256. *Com. Rep.* 43. *pl. 2.* *12. Mod.* 139. *5. Mod.* 343. *2. Salk.* 513. *Comb.* 459. *Carth.* 421.

(a)

(b) 6. State Trials, 53.

(c) 5. St. Tr. 645.

(d) Co. Lit. 303. a.

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against
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good (a); so that opinion to me seems wrong, being without any foundation.

And it was adjudged by THE COURT, that if but one overt-act is well laid, judgment must pass against the defendant: so held in *Rookwood's Case* (b).

THE COUNSEL for the king argued, that in capital cases it is sufficient to lay the purport of the words in the indictment; and that it was the opinion of the late *Chief Justice* HOLT, that in all cases for scandalous words it was the safest way to lay the purport of them in the action, because then the special matter might be given in evidence. It is true, in criminal cases the very words ought to be laid in the indictment, but not in capital cases; for suppose a man should get upon *Charing-Cross*, and read a declaration for THE PRETENDER, this would be treason, though the very words could not be laid in the indictment.

THE COUNSEL for the prisoner admitted all this, because the proclaiming THE PRETENDER would be high treason; but in the present case, the prisoner only gave a paper to *Lynch* to read, which is not a publication of that paper.

THE COURT. This paper is a scandalous and treasonable libel, which the Counsel for the prisoner at his trial called a *ballad*, and said, that it would amount to no higher a crime than to the publishing a *libel*, for which they ought to have been reprov'd at that time, but it was pass'd over, because it should not be said but that they had all manner of indulgence.

And now being asked, whether they had any thing more to say in arrest, they replied they had not.

THE PRISONER then said, that he had several accounts to make up with several persons, and particularly with *Lord Londonderry*, and that he hoped he might have a little time allowed for that purpose, because he would do justice to all men; and that he had a greater account to give to his Maker, and hoped that he might have some reasonable time allowed in that respect; and then if the king was not pleas'd to continue his life, he would convince the world, that he daz'd to die like a gentleman and a christian, and to appear before that just judicature, where he hoped to have a double portion of that justice which had been denied to him here.

The form of
passing sentence
on a person con-
victed of HIGH
TREASON.

PRATT, *Chief Justice*, then gave sentence thus: *Christopher Layer*, you are convicted of high treason, and on a very plain proof. You had Counsel of your own choosing, and a jury of your own admitting, for you excepted against thirty-four only. The facts which were proved against you were, your frequently correspond-

(a) Trinity Term, 3. Will. 3. *Rex v. Griepc*, *Ld. Ray.* 256. — See also *Haley's Case*, Mich. Term, 30. Car. 2.

(b) See Foster C. L. 245.

ing with THE PRETENDER, and a treasonable scheme of your own hand-writing. Your confession before the Council shews, that THE TOWER of *London* was to be seized, and also THE BANK OF ENGLAND, and the general of the army, * and other the king's friends, and likewise his royal person, and all the royal family, and that a declaration was to be sent to alarm all parts of the kingdom, and all this was to be done to a king who never offered the least wrong to any of his subjects, but who takes all possible care to maintain the laws, and to preserve the rights and liberties of the people, which laws he makes the measure of his government, and you have endeavoured to set a popish Pretender on the throne, who would introduce despotic and arbitrary power; and all this done by you who are a professor of the law, and who could not be a stranger to the happiness of our present constitution. But now you stand for judgment, which is, "That you be carried from
" hence to the place from whence you came, and from thence
" you shall be drawn to the place of execution, and there to
" hang, but not till you are dead, but be cut down alive, and
" your entrails cut out, and burnt before you, and your head to be
" cut off, and your body divided into quarters, and both your head
" and quarters to be disposed as his majesty shall think fit."

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against
LAYER.

* [94]

THE PRISONER desired, that his wife and sister might have leave to come to him, and that *Mr. Morgan* and *Mr. Jones*, two clergymen, might be admitted to him. But *Mr. Jones* not being in town, he chose another, and had a rule for that purpose.

The friends of a convicted traitor allowed to visit him.

On *Wednesday*, the twenty-eighth *November*, THE ATTORNEY and SOLICITOR GENERAL moved for a rule for his execution, and that the Court would appoint a time and place for that purpose; and said, that the chief design of executing such criminals was to be an example to others not to offend in the like manner, and to deter them from committing treason; and therefore they moved, that the execution might be in *Middlesex*, especially since overt-acts were proved in *Middlesex*, though the fact was done in *Essex*; and said, that there were many precedents for executing criminals in such places as this Court should think proper; and that the reason was stronger in case of high treason than it would be for felony, because the king has a greater property by the judgment in the body of a traitor than of a felon, he having power to dispose of the four quarters as he pleases.

If an indictment of treason be found, under a special commission, in the county of *Essex*, and removed for trial into the court of King's bench, the Court, after conviction, may order the prisoner to be executed on a particular day in the county of *Middlesex*.

CURIA. It seems reasonable, for all punishments are intended for example; and an execution must be the greater example where there is the greatest concourse of people.

THE COURT asked the clerk of the crown, if he knew any such precedents, who replied, that *Doctor Lopez*, convicted of treason in *Queen Elizabeth's* time, in *Berkshire*, was executed in *Devon*: so *Lord Audley*, in *Charles the First's* time, was executed in *Middlesex* for a fact committed in *Wiltshire*: so *Dale*, in *King James the Second's* time, was convicted of a felony in *Berkshire*,

Michaelmas Term, 9. Geo. 1. In B. R.

THE KING *Berkshire*, but executed in *Devon*. Two other late precedents *against* were mentioned; and that it was daily experience for a person **LAYER.** convicted of perjury in *Middlesex* to stand in the pillory at the *Royal Exchange*.

So a rule was made to the *lieutenant of the Tower* to deliver the prisoner to the sheriffs of *London and Middlesex*, and another rule to the said sheriffs to execute him on *Wednesday, December* the twelfth, at *Tyburn*.

* [95]

A clergyman charged with treason, though bailed, shall not be permitted to attend a convicted traitor previous to his execution. **THE KING'S COUNSEL** then moved the Court to alter the rule made the day before, for *Mr. Morgan*, the clergyman, to attend the prisoner, for that he was taken into custody upon suspicion of treason, and had given bond to appear in court this day.

THE COURT answered, that any clergyman should be admitted to the prisoner who was a person of known honesty, integrity, and learning, but not such who might harden him in his iniquity in his last moments; so two more clergymen were joined in the rule.

If a rule for the execution of a traitor be countermanded by a *reprieve*, the convict must be again brought up, and a new rule made for his execution. **As** afterwards, and on the very day before he was to be executed, he had a reprieve by his majesty's warrant, and so continued to be reprieved until *Friday* the eighth of *February*, when **THE ATTORNEY-GENERAL** moved for a rule to be made on the lieutenant of *THE TOWER* to bring up *Mr. Layer*, to know what he could say *quare executionem non*, &c. there being some (a) opinions, that he could not be executed by virtue of any warrant signed by the king; but that a new rule must be made in the court of king's bench for his execution.

The prisoner being accordingly brought up on *Monday* the eleventh of *February*, and having nothing to say in bar of execution,

(a) **HOLT**, *Chief Justice*, cited *Knightley's Case*, who was indicted for high treason in conspiring the assassination of king *William the Third*, and being arraigned at **THE BAR** in the king's bench confessed the indictment, and judgment of death was pronounced against him in *Easter Term*, and execution was countermanded, so that *Trinity Term* passed, and then in the long Vacation they had a design to execute it; and upon that, **ALL THE JUDGES OF ENGLAND** met to consider what could be done; and it was resolved by all, that in regard a Term had intervened without execution done, it could not be awarded without bringing *Knightley* to the bar; and **HOLT**, *Chief Justice*, said, that it would have been the same thing if *Trinity Term* had not been passed, but

only begun: so *Knightley* was imprisoned until Michaelmas Term; and in the mean time he obtained a pardon. *Ld. Raym.* 482, 483. *Doctor Henry* was convicted at the bar of the court of king's bench of high treason, in adhering to, aiding, and corresponding with, the king's enemies. *Trin. 31. Co. 2. Burr. Rep.* 643. He was ordered for execution upon *Wednesday, July 12, Trinity Vacation, 1758. Burr. Rep.* 651. The prisoner being reprieved by the king before the day of execution, the better opinion was, that he could not be executed without a new rule of court of king's bench; but in the mean time he obtained his pardon, which he pleaded in the king's bench in *Mich. Term, 1758.*—*NOTA to the former edition.*

MR.

Michaelmas Term, 9. Geo. 1. In B. R.

MR. ATTORNEY GENERAL desired a rule might be made for awarding proper writs for his execution on *Wednesday*, the twenty-seventh *March*, which was accordingly granted ; before which day he was further reprieved to the thir'd day of *May* ; and afterwards another rule was made to execute him on the seventeenth day of the said month of *May*, which was done accordingly at *Tyburn*.

THE KING
against
LATER.

M I C H A E L M A S, T E R M,

The Ninth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

The King *against* Scymour Richmond.

Case 61.

AN ATTACHMENT was granted last Term against the defendant *Richmond*, unless cause were shewn, &c. for that he being TOWN-CLERK of *Wallingford* had attached so much meal in the market there in sacks, and had sold the same under colour of the said attachment, when the owner would have given an appearance to the suit for which his goods were thus attached; and upon complaint made by the said owner to the mayor and burgessees there, he, the said defendant, was ordered to deliver the meal to the owner, upon giving an appearance as aforesaid; but the defendant refused to deliver the meal, and said, that the owner should never have his meal again.

An *attachment* lies against a town-clerk for attaching and selling goods brought improperly into the market of the town, instead of taking bail from the offender to answer the charge.

And now he shewed this cause why *an attachment* should not go against him, *viz.* he made an affidavit, that he was town-clerk of that borough, and that when he made out the order to attach the meal he thought it a good order; and that if the mayor and burgessees made any order for the defendant to deliver the meal to the owner, such order was only verbal, and not in writing, and that a verbal order could not supersede one in writing, and that if he had offered any contempt to such verbal order, he ought to be * punished there, where the supposed offence was done, and not by attachment.

* [96]

THE KING
against
SEYMOUR
RICHMOND.

TO WHICH *it was answered*, that where an officer of an inferior court abuses the process of that court, to the oppression of any person, he may be punished by this court; and that the defendant having issued out an *attachment* as the very first process, it is altogether irregular; and then afterwards to make use of it as an execution is still worse, and an apparent oppression; and his having sold the meal by virtue of that attachment, contrary to the express order of the mayor, and his declaring that the owner should never have it again, shews he had a design to oppress him. It is true, he swears that he had only a verbal order to deliver the meal; but yet that can be no excuse to him, because he is the very person (being the town clerk) who should have entered that order in writing.

THE COURT. The rule is for an attachment *nisi causa, &c.* and the ground of that rule is for oppressing a stranger; and if this is not denied, as it is not by the affidavit, then the defendant is guilty of this oppression.

So the rule was made absolute.

Case 62. The King *against* The Earl of Orrery, Lord North and Grey, Bishop of Rochester, Kelly, and Cockran, Prisoners in the Tower.

If a statute, as 9. Geo. 1. c. 1. suspend the Habeas Corpus Act for a certain time, and direct, that no Judge or Justice shall bail or try any prisoner without an order from the king, A PRISONER IN THE TOWER, committed by a secretary of state for high treason specially expressed in the warrant, cannot enter his petition on the first day of the ensuing Term, under the Habeas Corpus Act, to be tried the same Term; for by such act of suspension the power of the king's bench is suspended.—S. C. Fortif. 101. 12 Mod. 66.

BY the Habeas Corpus Act, 31. Car. 2. c. 2. s. 7. it is provided, that persons committed for “*treason or felony* specially expressed in the warrant, shall, upon prayer in open court, in the first week of the next Term, be brought to their trial, and if not indicted the next Term, then, upon motion on the last day of that Term, they shall be bailed, unless it appear on oath, that the king’s witnesses are not ready; and if on such prayer they are not indicted or tried the second Term after commitment, they shall be discharged; and the Judges refusing to grant a *habeas corpus* shall forfeit five hundred pounds, and the officer refusing to obey it a hundred pounds.”

By the statute 9. Geo. 1. c. 1. the Habeas Corpus Act was at this time suspended for a time.

One Kelly, a prisoner in THE TOWER for *high treason*, moved for leave to enter his prayer pursuant to THE HABEAS CORPUS ACT.

The same motion was made in behalf of Lord Orrery and Lord North and Grey, who were committed by a secretary of state for high treason.

And the Case of Bernardi (a) was mentioned, to shew, that this was a reasonable motion, because they might be intitled to the

benefit of the act, if it should ever be revived; for *Bernardi* was held to be out of the act, because he did not enter his prayer the first * week of the Term after his commitment, apprehending that he was not obliged to do it, because the act was then suspended, as it is now. And it was adjudged in the case of *the Earl of Aylesbury* (a), that a person lapsing the first Term after commitment can never after take benefit of that act; for it is in nature of a condition precedent required of them to make such prayer: and for this omission *the Earl* was adjudged precluded by the statute; though he was afterwards bailed by virtue of the discretionary power in the Court (b). Application must be made to that court which has power of trial; for which reason, in *Leason's Case* (c), who was committed to *Surrey Gaol* for felony, and moved this court to enter his prayer, the motion was rejected; because this court not being the proper court for the trial of prisoners in *Surrey Gaol*, the consequence of admitting such prayers would be, to bring all felons, burglars, and other criminals, to be tried in this court (d).

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COCKRAN,
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THE LIKE MOTION was made in behalf of the *Bishop of Rochester*; and it was farther urged by his Counsel, that THE HABEAS CORPUS ACT was not suspended, because the words of the act of suspension were, "That no Judge or Justices shall bail or try, &c. without order from his majesty's privy-council, signed by six privy-councillors;" and this Court is not (e) restrained by these words "Judges or Justices;" for the power and jurisdiction thereof cannot be taken away but by plain and positive words expressing the same (f); and it was said, that, notwithstanding this act of suspension, THE LORD CHANCELLOR for the time being might bail such prisoners, for he was not restrained by these words "Judge or Justice, &c." This court by its original jurisdiction is invested with an ordinary and extraordinary power, which cannot be taken away by implication in any statute (g). It has likewise a compulsory power by virtue of THE HABEAS CORPUS ACT, which commands this court to bail persons, &c. which power still subsists, notwithstanding the suspension; for these words, "no Judge or Justice shall bail or try," shall not include so high a judicature as this court; and this is agreeable to the usual construction of other acts of parliament; therefore that statute which deprives a man of his liberty shall not have so favourable a con-

(a) 1. Salk. 103. 3. Vin. Abr. 518. 521. 12. Mod. 117. Comb. 421.

(b)

(c) *Rex v. Leason and Edwards*, 1. Ld. Ray 461. Same point, *Rex v. Yates*, 1. Show. 191.

(d) The prisoners made the same application on 7 Sept. 1722 to the Judges at the Old Bailey; but the Court rejected the motion, as being against constant experience, and without a single precedent to maintain it; for THE TOWER, to which they were committed, is no part of

the gaol of NEWGATE, to the delivery of which gaol alone their commissions extended; and they held, that if they had even been in NEWGATE, and the treason was committed in *Surry*, or any other county, no prayer could be allowed. Fort. Rep. 101. 103.

(e) It was expressly adjudged to be within the act a little afterwards in this Term, *The King v. the Bishop of Rochester*.

(f) 4. Inst. 71.

(g)

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struction as other acts of parliament. And to induce the Court to be of this opinion, some late cases were mentioned where persons were bailed during former suspensions of this act, viz. the case of *Lord Aylesbury* (a), and the case of *Fitzpatrick* (b), and the case of *Sir William Windham* (c). Besides, there is sufficient matter to satisfy the words of the suspending act without extending them to the jurisdiction of this court; and that is by restraining the Justices of *oyer and terminer* and gaol-delivery, and Justices of *nisi prius*, from bailing or trying any man committed for treason; so that it shall not, by any construction, relate to this court.

PENGELLEY, *Serjeant*, argued for the king, that if this court admits the prayer, he feared the consequence would be, that they must be bailed; that if this motion should be granted by the discretionary power of this court, then some extraordinary circumstance ought to be shewed to induce the Court to grant it, in a case of high treason; but there is no pretence to such matter; they only rely upon the words in the act itself, as not restraining this court to bail persons; the words being, "That no Judge or Justice, &c. shall bail, &c." which words, as they would have them, do not extend to this court; but certainly this must be a mistake, because before the act of suspension was made, no Judge or Justice could bail for high treason; therefore those words must relate to this court, which is composed of Judges. Now if this court is not restrained, the act of suspension will be eluded, for some judicature was intended to be restrained (d), and if not this court, then it can be no other, because a Judge or Justice, before this act was made, could not bail (as hath been observed) for high treason; so that it was made purposely to restrain this court. The *Lord Aylesbury's Case* is not parallel to this case, because the *habeas corpus* was suspended only to him and them who were committed "on suspicion of treason or treasonable practices," but not to them who were committed expressly for "high treason." So that it appears by a very plain indication, that the intent of the Legislature was to restrain this court, and if so, it is as good as if restrained by positive words. Now that it was so intended appears by the very words of the act of suspension, "No Judge or Justice shall bail, &c." which words restrain this court, and also Justices of *oyer and terminer*; for if the Judges are restrained, the court must be so too, because it is composed of Judges; and my *Lord Coke* (e) tells us, that if the king sat here in person, justice must be administered by the Judges. It is to be observed, that this act is penned in the

(a) 1. Salk. 103. Comb. 421.
12. Mod. 66. 117.

(b)

(c) Stra. 2. 3. Vin. Abr. 515.

(d) In the case of *Rex v. Bernardi*, Michaelmas Term, 1. Geo. 1. it was adjudged, that the first Term after the expiration of a suspension act is the first Term after commitment within the mean-

ing of the statute 31. Car. 2. c. 2. for that is the first Term in which the prisoner is enabled to make his prayer; and that then he has a right to make it, 1. Strange, 143.; and if he omit so to do, he loses the benefit of the act. *Lord Aylesbury's Case*, 1. Salk. 104.

(e) 4. Inst. 71.

Michaelmas Term, 9. Geo. 1. In B. R.

most general words that could be thought on, and that the law-makers could have no other intention than to restrain the Judges from bailing either in or out of court ; and this seems to be the plainest construction of the act ; therefore if this court can neither bail the prisoners, or try them, it will be to no purpose to grant a *habeas corpus*.

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AND OTHERS,

So it was denied (a) ; and the rather, because it was denied in *Laver's Case* (b) ; for the Court would not try him until they had an order from the king, as the act directs.

(a) Leave was given to enter their prayer.—NOTE to former edition. (b) Ante, 82.

MICHAELMAS TERM,

The Ninth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

The King *against* Street and Stroud.

Cafe 63.

UPON A MOTION for a *mandamus* to the old churchwardens of the parish of C. to deliver the parish-books to the new churchwardens, &c.

A mandamus will not lie to the old churchwardens, to deliver the parish books to their successors.

A RULE was made for them to shew cause on such day, why a *mandamus* * should not go.

* [99]

At which day it was shewed for cause, that this was a new motion, and the like had never been made in this court, and that the late *Chief Justice* HOLT had denied to grant it to a steward of a court-baron.

S. C. C. f. 229.
pl. 186.
S. P. Doug. 506.
1 Black. Rep. 667.
1. Term Rep. 396.
2. Term Rep. 24.
Esp. Dig. 667.

But that which was now insisted on was, that the old churchwardens had a right to keep the parish-books (a).

So the rule was discharged, for a contest between parish-officers, which of them had a right to keep those books, ought to be tried at law upon a feigned issue.

(a) But see now 17. Geo. 3. c. 38. f. 3.

Case 64. The King *against* Hutchinson, Mayor, and The Aldermen of Carlisle.

If a burghers of a corporation offer to bribe a freeman to vote for a particular candidate for the office of mayor, the corporation, after summoning him to appear and answer this charge may, on his refusing to answer, disfranchise him, although he has not been convicted of the offence at common law.

- S. C. ante, 19.
S. C. Fort. 200.
S. C. 1. Stra.
385, 386.
2. Barnard.
K. B. 301.
Fitzg. b. 190.
2. Kel. 268. pl.
205.
1. Stra. 557.
2. Ld. Ray. 1283.
1. Burr. 339.
2. Burr. 723.
4. Burr. 1, 99.
Esp. Dig. 677.
679.

MANDAMUS to "The mayor, aldermen and common council of *Carlisle*," to restore one *Simpson* to the office of a capital burghers of the city of *Carlisle*, of which he had been deprived by them.

The return was, that the corporation had been time whereof, &c. a corporation by prescription, with power of amotion, and was incorporated by a charter in the time of *Charles the Second*, by the name of "The mayor, aldermen, and twenty-four capital burghers," who were to continue for life, unless they were removed by the mayor and aldermen, or the major part of them; that *J. Simpson* was duly elected a capital burghers, and took the oath accordingly, which was to regard the good of the corporation, and not to disclose the talk or word of any assembly; that he the said *Simpson* and one *Hutchinson*, intending to violate his oath (a), offered, contrary thereto, one *Harrison*, a freeman thereof, fifty guineas as a bribe for his vote and interest at the election of A MAYOR there, and promised that they would get a place for his son in THE CUSTOM-HOUSE; that by virtue of the said charter the mayor, &c. has power to remove, &c. for any lawful cause, provided the greater part of the common council agreed to such removal; that at an assembly of the mayor and nine aldermen, he the said *Harrison* had exhibited an information in writing of this matter *ad effectum sequen. &c.* in open court; that *Harrison* made oath thereof; and thereupon *Simpson* was summoned to appear before them; who, after his appearance (b), refused to answer certain articles in writing exhibited against him on this information, of which *J. Simpson* had a copy; whereupon this court of mayor, &c. adjourned from time to time three whole days, one after another, expecting that he would comply before they disfranchised him; but he not complying, was by another assembly adjudged guilty, and removed *pro male gest. et offens. in informatione et articulis superius mentionat. &c. quæ causa, &c.*

REEVE for *Simpson*, excepted to the return, and prayed a *peremptory mandamus*.

There are two questions:

FIRST, No sufficient charge of an offence is laid, for which he is removed. The information is *inter alia* "*ad effectum sequen. &c.*" and the articles are "*ad effectum eundem in informatione mentionat.*" so that the articles being relative to the information will be uncertain, if the information is so. The information ought to have charged the offence positively *in hæc verba*,

(a) The person for whom the bribe was offered was not chosen MAYOR, but another person.—NOTE to the former edition.

(b) *Quære*, Whether he appeared.

or at least the substance of them; for as much certainty is requisite in the return of an amotion as in an indictment. An indictment for a libel "*ad effectum sequent.*" was held insufficient; but had it been *secundum tenorem*, it had been good; for that implies an identity (a). It was resolved by HOLT, *Chief Justice*, that such an indictment for a libel need not shew the very words of the libel, but *scripsit quod*, and shewing the substance thereof, will be good (b). In any conviction before justices of the peace, as for deer-stealing, if the information is set forth *ad effectum sequent.* the conviction will be void (c).

SECOND QUESTION. The offence, being "*Bribery*," is an offence at common law, by which law the offender may be punished, but it is against MAGNA CHARTA to deprive a man of his freedom before he is convicted of a crime by the ordinary methods which that * law prescribes; for what security can any man have from the insults of power, if he may be removed from his freedom before conviction, or before a trial by the laws of his country, to which every man has an equal right; now if *Simpson* had been charged with *perjury* or *forgery*, which are crimes of a worse nature than *bribery*, yet he could not be removed before conviction. *Baggs' Case* (d) makes the distinction, that no member of a corporation can be disfranchised by a corporation, unless they have power by charter or prescription; if they have no such power, he ought to be convicted by the course of the common law, before he can be removed; a removal, where they have power by charter or prescription is, within MAGNA CHARTA (e), a judgment *per legem terræ*; and, if he be first convicted, that is *per judicium parium suorum*; but that distinction has of late years been denied for law. *Lane* (f) was removed from the office of an alderman for a libel by virtue of an express power given by the charter to remove, but he was restored, there being no precedent conviction. In the case of *The King v. The Mayor of Wilton* (g), on a *mandamus* to restore *Chalk* to the office of a burgess of *Wilton*, the corporation returned, that they were a corporation by prescription with power of amotion, and that they removed *Chalk* for having altered a name in one of the corporation-books; and it was adjudged by HOLT, *Chief Justice*, that he ought to be restored: First, because the offence being forgery, he was indictable by the common law, and consequently not removeable without a precedent conviction; and secondly, here did not appear any prejudice to the corporation, because the alteration might be for their advantage; and so he acted neither against his duty nor his oath. In the case of *The Queen v. Perrott* (h), the Court was of opinion that the return was insufficient, not shewing any conviction, though no *peremp-*

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against
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THE ALDER-
MEN OF CAR-
LISLE.

Fortesc. Rep.
204.
Carth. 408.
Ld. Raym. 415.
2. Salk. 416.
11. Mod. 79.85.
96.
12. Mod. 218.
2. Salk. 661.

* [100]

(a) 1. Salk. 417. 661.
(b) See Cowp. 683.
(c) Salk. 383.
(d) 11. Co. 99.
(e) Mag. Car. c. 29.

(f) Fort. 200. 275. 11. Mod. 270.
2. Ld. Ray. 1304.
(g) Hilary Term, 8. Will. 3.
(h) Mich. Term, 5. Anne.

Fitzgib. 190.
Fortesc. Rep.
200.

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tory mandamus was ever awarded; and in that case HOLT, *Chief Justice*, said, that many things in *Baggs' Case* were not law, and particularly that point where it is said, that if a layman be patron of an hospital, he may visit it, and depose or deprive the master upon good cause, but that if he be deprived without cause, he shall have *an assize*; which is not law, for no *assize* lies, where a visitor is appointed. And this inconvenience would follow, if such a removal should be allowed, *viz.* If the court of king's bench should be of opinion that the removal is good, and the person should be afterwards tried for bribery (which no man will deny but he may), and upon such trial he should be acquitted, then there would be a contrariety of opinions and clashing of judgment, which should be now foreseen so as to be avoided. It is true, these persons are incorporated by charter, but the king could not give them a greater power than he had to give, for he himself cannot deprive a man of his freehold before conviction, therefore the charter giving them a power to remove, &c. must be intended for a cause not cognizable at common law, *viz.* by doing any thing in the corporation contrary to his office, or by not doing his office, as a justice of peace not attending the sessions, or an officer of the corporation being a *common drunkard*, or guilty of any misdemeanor against the duty of his office, and which is no crime at common law; and there is a very plain difference between doing an unlawful act, and not doing the duty of his office, for the one is a crime, the other is only a contempt. But admitting that *Simpson* denied to answer the interrogatories, yet that cannot be a sufficient cause to disfranchise him; the rather because it is not a matter regularly before the Court; for they ought to have returned the information made by *Harrison*, and the articles specially, and not *ad talem effectum*, as was done in this return. Admitting likewise, that what is returned is a public offence, yet if the corporation has received no damage by it, they cannot remove the offender before conviction; now it does not appear by this return, that the body corporate is in the least damaged (*a*); it is true, the return is, that *Simpson* intended to violate his oath; besides, a breach of some parts of his oath would be no cause, for the oath is too general, "not to disclose any talk," whereas disclosing talk upon impertinent affairs could be no offence; but a bare intention shall not be prejudicial to him, unless he had done some act in pursuance of such intention; and no man can tell whether bribery at an election to promote * a particular man to be mayor, would be prejudicial to the corporation, or not. It was objected that this offence was not indictable; but certainly it is, for admitting it to be an offence, and prejudicial to the corporation, yet the person bribing ought not to be disfranchised, but rather to be indicted upon the statute of *Westminster the Second*, c. 5. (*b*) by which it is enacted, "That none shall disturb any by force, malice or menaces, to make

* [101]

(a) *Partijn*, for whom the money was offered, was not chose, but *ten.*

(b) 2. Inst. 169.

“ free election, in pain of great forfeiture;” and it is also against the common law.

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E contra. In answer to the chief objection, that *Simpson* ought not to be removed from his freehold before conviction, because the crime for which he was charged is an offence at common law; this was admitted to be true, but it is a crime relative to the duty of his office in the corporation, and therefore he may be removed before conviction; it is an offence which will destroy the very being of this corporation; it is contrary to his oath of fidelity when he was first admitted to his freedom. There are some cases where men have been removed for offences punishable at law, even before any conviction; as for instance, a man was removed for a riot in the council-chamber (a), which is an offence punishable at common law, yet the offender was removed before conviction; and so was *Serjeant WHITACRE*, who having notice, refused to attend at the sessions of the peace (b), for which cause he was turned out of the recordership of the borough of *Ipswich* before conviction. The like is often done in the colleges of both our universities (c); and *Baggs' Case*, which is THE MAGNA CHARTA of all cases of this nature, warrants this opinion, and especially since the statute of 9. *Anne*, which gives a traverse to the return of a *mandamus*, and which *Simpson* having refused, he has thereby implicitly admitted the crime for which he is charged; because, if it was false, he might have traversed the return, and therefore he ought not to be favoured. And as to his removal before conviction, this is a condition annexed to his freedom in this corporation, which he took, subject to be removed for any reasonable cause; and his removal is the more just, because he had all reasonable opportunities allowed him to defend himself if he could.

Fortesc. Rep.
206.
Ante, 3.
Post. 154. 377.

Upon the whole matter, a return of a *mandamus* needs not so much certainty as an information or indictment; because, if it be true, no punishment ought to be inflicted on that account (d).

REPLY. * The objection, That they should have set forth in the return the information of *Harrison in hæc verba*, and not *ad talem effectum*, is not answered; now the reason why that information should be set forth to a certainty is, because it is the very ground of the charge by which *Simpson* was removed; and it is not sufficient to say, that so much certainty is not required in this case as in an indictment, and to alledge for a reason, that no punishment is to be inflicted upon that account, because it is a great punishment for a man to lose his freehold. Besides, they have not set forth in this return, that *Simpson* had done any thing prejudicial

* [102]

(a) *Rex v. Yates*, Stiles, 477.

(b) 2. Salk. 434.

(c) 1. Sid. 14. 2. Sid. 97. 4. Mod. 37.
2. Ld. Ray. 1343.

(d) FORTESCUE, *Justice*, is of opinion, that a return to a *mandamus* requires the usual certainty, even much greater

than an indictment, for that may be traversed, but here the king cannot traverse. FORT. 204.—NOTE to the former edition. But for the certainty required upon this subject see *Rex v. Lynne Regis*, Dougl. 149 to 160.

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to this corporation; and as to *Serjeant Whitacre's Case*, it is no manner of authority in the present case; it is true, he was removed before conviction, but it was for not attending the sessions to direct the corporation in proceedings to administer justice, which was an offence done to the corporation, and consequently a forfeiture of his office of recorder.

72. Mod. 218.
See 11. Mod.
79. 85. 96.

PRATT, *Chief Justice*. By the return of this *mandamus* it appears, that *Simpson* was duly summoned, and that they who removed him had an authority so to do; but it must be for a lawful cause, which does not appear by this return; for the information and the articles grounded thereon, are not sufficiently set forth to inform the Court of the crime, being only returned *ad effectum sequen.*; now where words in an indictment for a libel were set forth *ad effectum sequen.* that was held insufficient in the case of *The King v. Bear (a)*; and there is no reason why an indictment should be more certain than the return of a *mandamus*; for in one case the party is to be punished, and so he is in the other, *viz.* by the loss of his freedom.

As to the question, Whether a man can be removed from his freedom for a crime punishable at law before he is convicted of such crime; PRATT, *Chief Justice*, held he could not (*b*); and that in the case of *The King v. The Mayor of Gloucester (c)*, it was so adjudged in point, that bribery was an offence punishable at common law; and that a juster trial might be had in the courts of *Westminster* than by a mayor and common-council-men in a corporation, who are generally corrupted, and use arbitrary methods in trials there. So he was of opinion that a *peremptory mandamus* ought to go.

* [103] * But THE OTHER THREE JUDGES were of a contrary opinion: their reasons were as follow :

It is agreed on all hands, that there was a crime done, and it sufficiently appears that the corporation suffered by it; for what can be a greater injury than corrupt members? and it seems very reasonable, that where the immediate good of a corporation is concerned, that they should have power to remove him who acts contrary to such good. This corporation has such a power by the very words of their charter, *viz.* "to remove for a lawful cause," for otherwise those words are insignificant; and it would be very hard if a corrupt member could not be removed before conviction, because in the mean time he will have a vote in all corporate acts, which may be prejudicial to the corporation where such a voter is guilty of so great a crime as bribery.

(a) 2. Salk. 417. Carth. 408. Ld. Ray. 415.

(b) But see the case of *Rex v. Tiverton*, post. 186. when PRATT, *Chief*

Justice, held, that *bribery* is a sufficient cause to remove a man from his office before conviction.

(c)

Michaelmas Term, 9. Geo. 1. In B. R.

THE COURT, as to the form of this return, were equally divided.

PRATT, *Chief Justice*, and POWYS, *Justice*, held it insufficient.

EYRE and FORTESCUE, *Justices*, held it well enough.

And therefore there could be no judgment against the return (a).

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(a) It is said, S. C. Fort. 200. that as to the form of the return the whole Court, after some little doubt, held it well, be-

cause on the whole return there appeared to be a good cause of removal.

Ludlam, Chamberlain of London, against Lopez. Case 65.

THIS was an action of debt for twenty-five pounds, brought by THE CHAMBERLAIN of London against the defendant, upon the statute 6. Anne, c. 16. by which the statute 1. Jac. 1. c. 19. for well *garbling spices* was repealed, and the duty arising by that act, which was part of the revenue of THE CITY OF LONDON, taken away, and an equivalent granted to the said city, by taking money to admit *brokers* to exercise their office.—The words are, that “every person who shall act as a broker, or employ any man under him to act as such in the city of London, shall be admitted by the court of mayor and aldermen there, and shall upon his admission pay to THE CHAMBERLAIN of the said city forty shillings, and every year, on the twenty-ninth day of September, forty shillings more, which money shall be enjoyed by the said city; and every person acting as a broker, and not being admitted as aforesaid, shall forfeit to the said city twenty-five pounds, to be recovered in the name of THE CHAMBERLAIN.”

The defendant by his plea confessed, that he had acted as a *broker* in THE CITY, and that he was not admitted thereunto; but farther sets forth the act of general pardon, 7. Geo. 1. c. 29. by which the king discharged all manner of offences which he might or could in any wise pardon; and averred, that this was an offence which the king might pardon, &c.

The plaintiff demurred to this plea, and the defendant joined in demurrer.

THEY WHO ARGUED for the defendant insisted, that this being an offence of a public nature might be pardoned, though the action for the duty must be brought by the subject. It is true, the admittance-money is given to the city as a recompence for taking away the revenue of *garbling spices*; but yet the offence of not being admitted as a *broker*, is pardoned; for all amerciaments are pardoned, though the subject has a right to them, and so are all popular actions before they are actually commenced, even though the action is given to a particular person, who is the party aggrieved; therefore this offence is pardoned with all its consequents.

If a statute as the 6. Anne, c. 16. abolish the office of *Garblers of Spices* in the city of London, and in lieu thereof enact, “that every person acting as a broker shall pay forty shillings yearly to the city, on penalty of twenty shillings;” the king cannot by his pardon discharge a person from the payment of this penalty; for the interest in it is vested in the city from the time the offence is committed.

* [104]

S. C. 1. Stra. 529.
Dy. 238. 323.
Cro. El. 6, 2.
682.
Cro. Car. 199.
5. Rep. 49, 50.
a. b.
1. Salk. 458.
1. Stra. 529.
2. Stra. 1272.
4. Barr. 2460.
5. Com. Dig.
“Pardon” (1).

The

LUDLAM,
CHAMBER-
LAIN OF LON-
DON,
against
LOPEZ.

The trade of a broker was lawful before 6. *Ann.* c. 16. so that the exercise thereof without a licence is only an offence against that act. The demand by THE CHAMBERLAIN in this action is founded on a misfeasance for acting without a licence. There is a duty by the act payable by every broker, and vested in the city, for which if any action was brought, there could be no pretence that the same was pardoned, that being a private property. This offence is made by another distinct clause of the act. The duty payable by the act is twenty pounds for the admittance of every broker; but the tort and contempt in the defendant's acting without any licence is the original cause of this action.

IT WAS ARGUED *for the plaintiff*, that the act which intitles the city to the forfeiture, gives it in lieu of another part of their revenue taken from them, and the money which is to be paid by the brokers is in nature of a rent to be received by THE CITY for a duty which was vested in them before, and in recompence of a civil right of which they were now deprived, which recompence being confirmed by the statute, and a penalty given for not complying with that law, such penalty cannot be pardoned, especially since an action is given by the statute for the recovery thereof. If the duty payable on every admittance be not pardonable, then the forfeiture for acting without admittance cannot be pardoned, because that is an injury to the city in depriving them of the duty which otherwise would be payable. This may be compared to a lease with a *nomine pœne*, or to a bond with condition of forfeiture. The city might have released the forfeiture before any action commenced, which proves an interest vested. As to *Biggin's Case* (a) an amercement is no satisfaction to the party, and so may be discharged. The same reason holds as to burning in the hand. The reason given by my *Lord Coke* (b), why the king cannot pardon a popular action after it is commenced, as to the informer's part, is, because an interest is then vested; but before the action is brought, no interest is vested in any particular person; and therefore the king can pardon it; which reason will hold in this case, because there is a right vested in the city before this action was brought, and before the general act of pardon was made, *viz.* a right to the duty arising by the garbling of spices, and a right to that recompence which was given in lieu thereof, so that this action is well brought, and not pardoned. If an action of assault and battery be brought, the king cannot pardon the damages recovered in such action (c). So where a libel is exhibited in the spiritual court, and the plaintiff obtains a sentence, and costs are taxed, the king by a general pardon cannot discharge those costs (d); and it is * for the same reason that the king cannot pardon an appeal, because the subject has an interest in that suit (e).

THE COURT. This is a duty given to THE CITY OF LONDON for and instead of another duty taken from them by act of

(a) 5. Co. 50. Cro. Eliz. 632.

Moor, 571.

(b) 3. Inst. 195. 394.

(c) 5. Co. 51.

(d) Cro. Car. 199. Cro. Jac. 159.

(e) 5. Com. Dig. "Pardon" (F.).

Michaelmas Term, 9. Geo. 1. In B. R.

LUDLAM,
CHAMBER-
LAIN OF LON-
DON;
against
LOPEZ.

parliament, and this forfeiture is given as a provisional security for what they might suffer thereby, and therefore it is not pardonable; and as a right vests in an informer immediately upon bringing his action, so in this case, in that very instant of time in which the offence was done, a right vested in THE CHAMBERLAIN, which intitles him to an action for the forfeiture, and which the king cannot pardon. He cannot pardon an offence against the statute *de malefactoribus in parvis*, as far as any man has an interest therein (a). It is true, it was held in *Biggin's Case* (b), that the queen might pardon the burning in the hand; but this seems to be the opinion of my Lord Coke alone (c); and it is plain that the reason he gives does not warrant that judgment; for he tells us, it is because burning in the hand is no part of the judgment; which is certainly a mistake, for in an appeal, as that case was, it is part of the judgment; besides, that case is reported in several other books, but the same reason in none of them for that judgment (d); therefore it is probable that the true reason might be, because burning in the hand is a punishment to be inflicted on a criminal for the public good, in which no particular subject has any right. And lastly, a pardon is properly a release given by the king; but it is a general rule, that a right which is vested cannot be released.

So judgment was given against the defendant, viz. that this offence was not pardoned.

(a) 2. Inst. 200. 3. Inst. 238.

(c) 3. Inst. 238.

(b) 5. Co. 50. Moor, 571. pl. 782.
Cro. Eliz. 632.

(d) Moor, 571. Cro. Eliz. 632. See
also 2. Hawk. P. C. ch. 37. s. 39.

* [106]
Case 66.

Blackwell against Nath.

Michaelmas Term, 8. Geo. 1. Roll 212.

THE PLAINTIFF covenanted by indenture to transfer, &c. South Sea stock to the defendant, on or before the twenty-first day of September, and the defendant covenanted to pay the plaintiff eight thousand five hundred pounds, on or before the said day; and entered into a bond in the penalty of sixteen thousand pounds, conditioned for the performance of the said covenant.

If A. covenant to transfer stock on or before such a day, and B. covenant to pay a certain sum of money to A. for the stock on or before the said day, the transfer of the stock is not a condition precedent; and therefore a declaration in covenant by A. for non-payment of the money, stating that he was ready

In an action of debt brought on the said indenture, the breach assigned was for non-payment of the eight thousand five hundred pounds, and the plaintiff in his declaration set forth all this matter, and that *pro et in consideration premissarum*, the defendant covenanted to pay the money; then he set forth, that he (the plaintiff) was ready at the time and place agreed on to transfer the stock, * and that then and there *obtulit se* to transfer it; and averred, that the defendant *adunc et ibidem recusavit acceptare*.—The defendant demurred to the declaration.

dy to transfer on the day, but that the defendant refused to accept it, is good.—". C. 1. Stra. 535. Ante, 40. 68 Post 204. 219. 1. Roll. Abr. 466. 1. S. and. 320. Law. 406. Id. Ray. 687. 5. Com. D. g. "Pleader" (C. 53.). (C. 54.). (C. 56.). Dougl. 684. (650). Comy. Rep. 116. Stra. 615. 722.

The

Michaelmas Term, 9. Geo. 1. In B. R.

BLACKWELL
against
NASH.

The question was, Whether these were *mutual covenants*, or only a *condition precedent*? for if they were mutual covenants, then the action is well brought, but otherwise if it be a *condition precedent*, because then the performance of that condition must be set forth.

This case was spoken to in *Michaelmas Term*, in the eighth year of *George the First*.

It was objected, that the tender was not sufficient, for it ought to be made the last instant of the day, for until then the defendant was not obliged to accept the stock; wherefore the plaintiff ought to have specified the hour when the tender was made, that so it may appear to be the last instant when a transfer could be made (a).

WEARG, *contra*. This being a personal tender, need not be made the last instant of the day; but if made any part of the day is good, and differs from a tender made in the absence of the party, which must be the last instant of the day, because the party has until then to accept it.

And THE COURT seemed of the same opinion.

Sed adjournatur.

This Term the plaintiff had judgment without argument.

And upon a writ of error (b) afterwards brought in THE EXCHEQUER CHAMBER, that judgment was affirmed.

(a) See *Mordant v. Small*, post. 219. *Bullock v. Nole*, 1. Stra. 579. *Duke of Rutland v. Hodgson*, Stra. 777. *Thorn-ton v. Meulton*, Stra. 533. *Bowlen v. Bridges*, 2. Stra. 832. *Clark v. Tyson*, 1. Stra. 504. *Lancashire v. Killingworth*

Corn. Rep. 116. 1. *Ld. Ray.* 686. 12. *Mod.* 529. *Sayer's Rep.* 189. *Goodison v. Num*, 4. *Term Rep.* 761.

(b) See S. C. in 1. Stra. 535. the third edition.

* [107]
Case 67.

Warren against Confett.

If A. covenant to transfer stock, and B. covenant, under a penalty, to accept the same, a declaration in debt by A. for the penalty ought to shew that he actually transferred the stock, and that B. refused to accept it; for it is not enough to say, that he was ready to transfer, &c.

S.C. Pract. Reg. 306.
S. C. 1. Bar.
K. B. 15.

AN ACTION OF DEBT was brought by the plaintiff in the court of common pleas. He declared upon an indenture by which he covenanted to transfer twenty-five shares in the *Welch Copper Company*, and the defendant covenanted that he would receive and pay for the transfer, &c. and bound himself in the penalty of two thousand eight hundred pounds to perform the same, and for non-performance thereof this action * was brought.

The defendant pleaded *nil debet*, to which plea the plaintiff demurred, and had judgment in that court for the insufficiency of the plea, for that *nil debet* is an ill plea to this action.

A WRIT OF ERROR was thereupon brought in the court of king's bench.

It was argued, that this judgment was erroneous.

FIRST, An objection was made to the form of the declaration, viz. that the plaintiff had not set forth, that he had done all things necessary

necessary for him to do, to intitle himself to this action, for he should have alledged, that he tendered to transfer the shares on a certain day, hour, and place, and that the defendant refused to accept them; and he only shews that he was ready to transfer them *debite modo*, but does not say at what time or place; now where it is set forth as it ought to be, at a certain time and place, and no person is there to receive it, the party must shew at what time of the day he was at the place, and how long he stayed there; though a refusal is shewn, yet it is not shewn to be at that time (a).

WARREN
against
CONSETT.

SECONDLY, Because *nil debet* was adjudged no good plea, " *Nil debet*" is which is erroneous, it being certainly a very good plea; for no: a good plea to an action of debt, for a penalty on a covenant.

BUT ON THE OTHER SIDE it was argued to maintain this judgment, that *nil debet* is no good plea in this case; and the chief reason was, because of the solemnity of a deed; now here the debt arising merely upon the deed, and not on any collateral matter *dehors*, in such case the defendant should have denied the deed, and have pleaded some other deed to avoid it; for if he once own the deed, it is then a good debt, and therefore *nil debet* is no good plea to it. Besides, it is a plea which includes several issues, and for that reason it is ill. It is no good plea to an action of annuity, nor to an action of debt on a bond brought by an administrator; it is true, it is a good plea to an action of debt brought for rent reserved upon a lease for years; but the reason is, because the demise is the foundation of the action, and the deed is only an evidence of the demise; and so it is a good plea to an action of debt brought on penal statutes, and to actions of debt brought upon awards, or to accounts before auditors; and the reason is, because these are not the deeds of the parties, but here the deed of the party himself is the very *lier*, and not any thing *in pais*; and the gist of the action is for payment of money. * It is no good plea to an action on a policy of insurance, nor to an action on a bail-bond, though there is something *dehors* to be done, to charge the insurers and the bail.

THE COURT was divided in opinion, but seemed inclinable to reverse the judgment (b).

(a) See Mordant v. Small, post. 219. and the cases there cited.

(b) This case was first argued in Hilary Term, 8. Geo. 1.; 2. Stra. 778. It was argued a third time in Mich. Term, 11. Geo. 1. post. 325. and in Easter Term, 12. Geo. 1. the judgment of the common pleas was unanimously affirmed, for that the action being founded on the articles, and the particular facts being only auxiliary to the deed, the plea of *nil debet* was no good plea, S. C. post. 382. S. C. 2. Stra. 778. for if in such case this plea was allowed, it would refer the validity of the deed to the consideration of the

jury, S. C. 2. Ld. Ray. 1503. So in debt on bond, the plea of *nil debet* is bad on a general demurrer. Archynous, 2. Willf. 10. S. P. Bull. N. P. 169. S. P. Hart v. Weston, 5. Burr. 2586. S. C. 2. Bl. Rep. 682. S. P. Mills v. Bond, Fort. 363. Mayhew v. Mayhew, Fort. 367. But it is said that *nil debet* to an action of debt on bond, is good after verdict, 2. Willf. 10. and is a good plea to debt on a contract, 5. Com. Dig. "Pleader" (2. W. 16.) or where the specialty is only inducement to the action, and the matter of fact is the foundation of it, 2. Ld. Ray. 1503. Wilson's Case, Hardres, 532.

* [108]

Cafe 68.

Pennoire *against* Brace.

S.C. 1. Ld. Ray.
244.
S. C. 5. Mod.
338.
S. C. 1. Salk.
319.
S.C. Comb. 441.
S.C. Carth. 404.
S. C. 12. Mod. 130. S. C. 1. Show. 402.

IT WAS RULED in this case, that where a writ of error is brought by two, and one of them dies pending the writ, the plaintiff in the original action by entering a suggestion on THE ROLL, that one of the plaintiffs in error is dead, may take out execution on the judgment, without suing out a *scire facias*, either against the heir or executor of the dead person.

Cafe 69.

Flemming *against* Parker.

On a declaration of four counts, if there be a demurrer to one, and issues on the others, a writ of inquiry on the demurrer, reciting a judgment *promissis*, is good, after a writ *ad damna* on the issue.

THE PLAINTIFF declared on four counts, and the defendant demurred to one, and pleaded to issue as to the other three, and the plaintiff joined in demurrer, and had judgment, and a writ of inquiry issued, reciting a judgment *de premissis*, and that

IT WAS MOVED in arrest of judgment, that a writ of inquiry would not lie on this judgment until a *nolle prosequi* was entered as to the other three issues, or a *venire* to try them; for then, and not before, a writ of inquiry might be had to inquire of the damages upon the judgment in demurrer.

But in this case the plaintiff having *remitted the damages* as to the other three issues, before the judgment was entered on the demurrer, IT WAS HELD good: and THE MASTER of the office affirmed, that that was the proper method of proceeding.

* [109]
Cafe 70.

Coatsworth and his Wife, Administrator of W. S. *against* Shaftoe.

Friday, 23 November 1722.

If an administrator bring trover on a conversion in his own time, he shall pay costs on a verdict for the defendant.

TROVER. The plaintiffs declare that their testator W. S. on the eighth day of December 1718, was possessed of ten horses, *et sic inde possessionatus existens eodem die et anno, obiit intestat. post cujus mortem* &c. on the twenty-third day of April 1720, administration was committed to the plaintiffs; that afterwards, on the eighth day of April, the said horses were lost; *et eodem die et anno devenerunt per inventionem* to the defendant, who converted them, &c.

Stra. 632.

2. Stra. 785.
Barnes, 186.

Andr. 357. 359.
Reg. C. P. 115.
Vent. 92.

Upon *not guilty* pleaded, there was a verdict for the defendant.

FAZAKERIE moved, that the defendant might recover his *full costs*. The difference is, wherever an executor brings an action, and upon his declaration shews matter sufficient to enable him to sue in his own name, without styling himself executor, if a verdict pass against him, he shall pay; but otherwise where he is obliged to sue as executor. The plaintiff here might have declared on his own possession, and the evidence would have been sufficient: the

Michaelmas Term, 9. Geo. 1. In B. R.

the goods being lost after the administration committed, there was a possession in the administrator, which would have enabled him to have brought the action in his own name; so that the conversion is an injury to the administrator.

COATSWORTH
AND HIS WIFE
ADMINISTRATOR OF W. S.
against
SHAFTOE.

ON THE OTHER SIDE *it was argued*, that an executor shall never pay costs, unless he declares upon an actual possession (a).

THE COURT: This point ought not to be now questioned; all the cases were considered; and the point settled, in the case of *Baller v. Delander* (b).

(a) 2. Lev. 165. 3. Lev. 60. 375. 2. Ld. Ray. 1413. Downer v. Shaft, 6. Mod. 9. 2. Stra. 1107. Andr. 358. Barnes, 129. Cockeril and his Wife v. Knyston, 4. Term Rep. 277. Goldthwaite and his Wife v. Petrie, 5. Term Rep. 234. in point.
(b) 2. Stra. 785. Annalee, 205. See also Jenkins and his Wife v. Plumble, 6. Mod. 91. 181. Portman v. Carne,

Cooper against Beale.

Case 71.

AN EJECTMENT was brought to recover the possession of a Quakers Meeting-house; none of them would receive the declaration, and the meeting-house was never open but on *Sundays*, on which day the delivery of a declaration is not good.

In ejectment, judgment cannot be entered upon confession of the casual ejector.

Thereupon the plaintiff took a judgment by confession of the nominal defendant.

Run. Eject. 6. 58. Salk. 255.

And now upon a motion that judgment was set aside; because in fact it is the confession of the plaintiff himself.

Holoway against Thurston.

Case 72.

IN AN ACTION ON THE CASE, &c. the plaintiff declared, and laid his damages to four hundred pounds.

If the statute of Limitations be pleaded to an action for 400l. a replication that a *latitat* for 150l. was sued out, without averring it for the same cause, is bad.

The defendant pleaded the statute of Limitations, "*non assumpsit infra sex annos.*"

The plaintiff replied, that he sued out a *latitat* to take the defendant two years before the action brought, for one hundred and fifty pounds.

And upon a demurrer to this replication,

IT WAS INSISTED for the defendant, that these were different actions; for no man would take out a *latitat* for one hundred and fifty pounds, and declare *ad damnum* four hundred pounds; it is true, if the plaintiff had averred it had been one and the same cause of action, it might have been otherwise.

And so it was ruled by the Court.

Michaelmas Term, 9. Geo. 1. In B. R.

Case 73.

Wright against Mason.

If a wife commit a trespass, and an attorney, for the purposes of extortion and oppression, procure a warrant and apprehend the husband, the court will grant an attachment against him.

UPON A MOTION for an attachment against the defendant and one Purcell, an attorney, for foul practice, and for oppressing the plaintiff, by threatening to take him up by a warrant of the Chief Justice, and by colour thereof getting some money from him, and a note under his hand to pay more for not sending him to Newgate for a trespass they pretended to be done by his wife;

A RULE was made for them to shew cause on such a day, why an attachment * should not go against them.

And upon that day they appeared and produced several affidavits, * [110] which were read in court, and by which they denied the charge, but not positively and directly.

Ante, 81.

And it appearing by the affidavits that the fact was done by the wife, there was no colour to procure the warrant of the Chief Justice against the husband; and it farther appearing that the attorney had indorsed this note to another, on purpose to load the plaintiff with an action, he was ordered to stand committed until he should answer interrogatories, which were to be filed in four days.

And afterwards, in answer to the interrogatories, he swore off all that was charged against him, for which he was indicted, and convicted of perjury.

Case 74.

Cæsar against Holt and Others.

The Court will not grant an attachment on affidavit of a rescous.

A RULE was made for the defendants to shew cause why an attachment should not go against them for committing a rescous, &c.

And now they shewed for cause, that such attachments ought not to be allowed upon affidavits of a rescous, because in such case the parties might be taken into custody before the writ is returned; therefore the sheriff ought to return a rescous before the defendants should be prosecuted for it (a).

S. P. 2. Barnard
K. B. 58.
Post. 342.
Salk. 586.
Stra. 531. 642.
6. Com. Dig.
"Rescous"
(D. 6.).

And THE COURT was of opinion, that the sheriff ought to return the writ, which if false, then the plaintiff has an action against him; but if the return be true, then the action lies against the rescuers (b); therefore if an attachment (c) should be granted on an affidavit of a rescous before the return of the writ, the defendant could have no action against the sheriff for a false return.

(a) See Sheather v. Holt, Stra. 531. and Rex v. Elkins, 4. Burr. 2129.

(b) Cro. Jac. 485. 3. Bulst. 200. Cro. Car. 109. 6. Com. Dig. "Pleader" (D. 2.).

(c) Cro. Jac. 419. 2. Vent. 175. Salk. 586. Rex v. Pember, B. R. H. 112.

HILARY TERM,

The Ninth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*

Sir Lyttleton Powis, *Knt.*

Sir Robert Eyre, *Knt.*

Sir John Fortescue Aland, *Knt.*

} *Justices.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

* [III]

* The King against The Mayor and Burgesſes of Tregony. Case 75.

UPON A MOTION for a *peremptory mandamus*, the case was, that a former *mandamus* was directed to the mayor and burgesſes of Tregony in Cornwall, commanding them, "*quod eligetis et juretis majorem, &c. secundum auctoritatem veſtram, &c.*"

A *mandamus* directed to "the mayor and burgesſes," commanding them "to elect and swear in a mayor *secundum auctoritatem veſtram,*" is good, although the power be for the burgesſes to elect and the mayor to swear in.

IT WAS MOVED for a *superſedeas* to that *mandamus*, for that the writ was not good, becauſe it was directed to the mayor and burgesſes to elect and swear a mayor, whereas the power of electing is only in the burgesſes, and the power of swearing in the mayor alone; ſo that the mayor cannot make a return of this writ as directed to him to elect; nor the corporation as directed to them to swear a mayor, ſo that if the burgesſes ſhould make a return as to the swearing part, they would be uſurpers, and if they do not make a return, they will be in contempt of this court. Beſides, it is incongruous for a *mandamus* to be directed to swear a mayor not yet elected; therefore it being directed to a perſon who had no power to act, it ought to be ſuperſeded, like the *Caſe of the City of London*, where ſuch a *mandamus* was directed to the mayor and aldermen, &c. when the power was in the mayor alone, and that was adjudged in this court to be not good.

S. C. poſt. 127.
1. Roll. Abr. 409.
2. Jones, 52.
Salk. 699. 436.
Carth. 501.
Stra. 55. 640.
893.

2. Burr. 782.

But 3. Burr. 1452.

THE KING
against
THE MAYOR
AND
BURGESSES OF
TREGONY.

BUT THE COURT were all of opinion in this case, that they ought to make a return, for the writ commanding them, "*quod eligetis et juretis secundum auctoritatem vestram*, it * shall be taken *reddendo singula singulis*, and to be the return of both, &c. (a).

* [112]
Previous to the
11. Geo. 1. c. 4.
s. 1. if a particular
day was appointed
by the charter of a
corporation for the
election of a

THEN they returned, that *Tregony* is a borough incorporated by letters patent of king *James the First*, by which it is provided, that they proceed to an election of a mayor every year, on the *Thursday* next after *Michaelmas-day*, and that the mayor elected at that time shall continue mayor until another be duly elected; and farther they return, that the day of election being past, they cannot obey it, and proceed to a new election on any other day than that very day appointed by the charter by which they are incorporated, unless on the death or amotion of the mayor.

mayor or other
corporate officer
with a power of
holding over,
they could not
elect on any other
day in the year,
except on the
death or removal
of the mayor for
the time being.

And now the following objections were made both to *the writ* and *the return*.

Post. 127.

FIRST, as to the writ, that it was directed to the mayor and burgeses to elect and swear a mayor, where the power of swearing, &c. is in the mayor alone; and though the Court was of opinion, that this writ ought not to be *superjeded* before it was returned, because if there is a fault, it might judicially appear before them, yet when the fault appears upon the very return itself, the writ ought to be quashed. Now there is a plain difference between a writ to elect, and another to swear a man into his office; for the writ to elect may be directed to the whole body corporate, of which the mayor is the head; but a writ to swear the person elected must be directed to the mayor alone, because no other person has authority to swear him, and no such authority can be given but by special words in the charter; and it would be very hard if this writ should be good, because the execution thereof would subject the parties to an information for usurping an authority where they had none.

SECONDLY, then as to *the return*, it is, that they could not obey the writ, because the day of election of a mayor was lapsed, and that they could not proceed to a new election, but upon the very day appointed by their charter, unless upon the death or amotion of the mayor in being.

IN ANSWER TO WHICH *it was argued*, that the day was only directory, and that there could be no inconveniency, if they should proceed to an election on any other day, because the writ of *mandamus* usually goes to fill up the body corporate, for the sake of succession, which is a case of necessity.

BUT THEY WHO ARGUED *for the return* said, there could be no such necessity in the present case, because the corporation was

(a) But see *Rex v. Mayor of York*, made, it is too late to take objections to the writ itself. 5. Term Rep. 74.

full; therefore there was no necessity to elect on any * other day than on that appointed by the charter; besides, if the return be not true, it ought to have been traversed (a).

THE KING
against
THE MAYOR
AND
BURGESSES OF
TREWENT.

THE COURT was of opinion, that *the writ* was good upon a reasonable construction of the words *reddendo singula singulis*; for it is directed to the body corporate, who has the inheritance as to the election of a mayor, and likewise to him who has the special power as to the swearing a mayor, it being that *eligetis et juretis secundum auctoritatem vestram*. Now all those to whom *the writ* is directed, are to do something, for they are all to be present at the swearing a new mayor when the oath is administered to him, which is usually done by the town-clerk, and so far they may be said to have a power to swear him, for the mayor is present, and so are the burgesses at that time.

THEN as to *the return*, it is likewise good, for though it has been said that the day is only directory, yet it is clear by the charter, that they must chuse a mayor on the very day therein appointed, which is on *Tuesday* next after *Michaelmas-day* every year, and that he must continue mayor until another be chosen, *secundum formam literarum patentium*; now it cannot be said, that a mayor chosen on any other day was elected *secundum formam literarum patentium* (b).

For which reasons it was adjourned (c).

(a) See 9. Anne, c. 20.

(b) See statute 11. Geo. 1. c. 4.

(c) A peremptory mandamus was denied, S. C. post. 12.

Atwood against Beach.

Case 76.

JUDGMENT was had against the principal, and a *scire facias* was brought against the bail of *John King*, when his name was *Thomas King*, and after two *nibils* returned, the bail were taken in execution; and this matter appearing now to the Court upon a motion,

Bail taken on a *scire facias* misnaming the principal, shall be discharged on motion after two *nibils* returned.

THE COUNSEL for the bail prayed, that they might be discharged;

Which was accordingly done.

SED PER CURIAM, If the *scire facias* had been returned *scire feci*, they could not be discharged, because they might have pleaded this matter in *abatement*, like the case of *Day v. Guildford* (a); which was tenant for life, remainder to his issue in tail, the tenant for life acknowledged a statute, and died; then the cognizee brought a *scire facias* against the heir, who was the issue in tail, and the sheriff returned *scire feci*; and thereupon judgment was had against him; and being turned out of possession of the lands

(a) 1. Lev. 41. S. C. 1. Sid. 54. S. C. Ray. 19.

ATWOOD
against
BEACH.

* [114]

by virtue of that judgment, he brought an ejection, &c.; and it was adjudged, that he was bound by the execution, and that he had no remedy either by *ejection*, or by * *writ of error*, or by *audita querela*, or by any other means, but only by action against the sheriff for a *false return*, if it was so, because it was his own fault, by not pleading to the *scire facias*, that he was the issue in tail, after the sheriff had returned him "warned."

Case 77.

The King, *against* The Mayor of Tenterden.

The Court will grant an information against a mayor, for the purpose of trying a corporate right.

A RULE was made for THE MAYOR to shew cause why an information should not go against him, for taxing several persons who lived out of the corporation to be contributory to building a bridge, and other charges within THE CORPORATION.

The mayor shewed for cause, that though the persons thus taxed did not live within THE CORPORATION, yet they dwelt within the *liberties* thereof, and were intitled to the like privileges of those who lived within THE CORPORATION; one whereof was to be exempted from all taxes in the county at large, so that it is reasonable they should be contributory to the charges, within THE CORPORATION, when they had the benefit of the privileges thereof; besides, the tax now in question had been paid by such out-dwellers time out of mind.

BUT THE COURT directed, that this matter should be tried upon an information, and that for two reasons; the one, because a single person might not be able to contest this matter in an action against the whole corporation; and the other, because if a verdict should pass for or against such single person, it would not end the contest which might happen against the rest.

* [115]

Case 78.

Hodgkins *against* Corbett.

The city of London have cognizance of these words, "Thou art a cuckoldly old dog, call down the bitch your wife," for they are tantamount to calling her "a whore;" and therefore on a suggestion that they were spoken in London, the spiritual court shall be prohibited from proceeding on them.—S. C. 1. Stra. 545. Post. 176. Stra. 471. 555. Andr. 300. Fort. 347. 2. Wils. 62. 4. Bac. Abr. 521. 4. Burr. 2032. 6. Com. Dig. "Prohibition" (G. 14). 2. Term Rep. 473.

LIBEL in the spiritual court for these words, "Thou art a cuckoldly old dog, call down the bitch your wife."

And now upon a motion for A PROHIBITION, the suggestion was, that there is a custom in London to punish whores by carting and whipping them; and that the said words are actionable there by the custom of the place, and avers, that if the words set forth in this libel were spoken, it was in London, in the parish of, &c. and though the plaintiff might have a remedy at law against the now plaintiff in the prohibition, for speaking the said words, yet he had exhibited a libel, &c.

And upon this suggestion a prohibition was granted.

* IT WAS NOW MOVED for a consultation, that admitting these words were spoken in London, yet they are not actionable there by

the custom of the city, because the custom extends only to such words which are directly defamatory, and not to such which are so by implication; and to prove this matter, the cases in the margin were cited (a). The case of *Houblon v. Milner* (b), reported in *Lutwyche*, was for calling a man's wife "a common woman;" and there was the like suggestion, as in this case, for a prohibition, but it was denied, and a consultation granted; and the reason there given is, because the custom of *London* extends only to calling a woman "whore," and not to such words from which it may be collected she is so. The words are uncertain, because the husband might be a cuckold by a former wife, and not by the plaintiff: so that if the words are not actionable by the custom of *London*, the suit in the spiritual court must proceed.

NORTHEY, *contra*. The case of *Houblon v. Milner* has been denied for law (c), wherever the husband and wife libel for words spoken of the wife: all the latter authorities are, that an action lies in *London* for words tantamount to calling a woman "whore:" and prohibitions have been accordingly granted. In the case of *Gibbons v. Harwood* (d), the plaintiff being a single woman libelled in the spiritual court for these words, "she is with child;" a prohibition was moved for and granted upon a suggestion of the custom of *London*, though the same objection was made; for the words are a charge of the crime of incontinence, which makes the offender liable to punishment by the custom of *London*. In the case of *Milbourn v. Povey* (e), the plaintiff libelled against the defendant for calling her husband "cuckold:" and there a prohibition was granted upon the same suggestion.

PRATT, *Chief Justice*. If the uncertainty of the words be an argument that no action lies by the custom of *London*, the same argument proves that they are not suable in the spiritual court. It is very nice to maintain that no action lies unless for the word "whore;" if the words import a charge of incontinence, they are actionable in *London*. As to the uncertainty, the latter words, "call down the bitch your wife," tie up the former so as to make them relate to the plaintiff. The case of *Gibbons v. Harwood* (f) is truly stated; and in that case Mr. DEE, *Common Serjeant*, satisfied us that an action lies in *London* for any words that amount to calling a woman "whore" (g).

(a) 2. Roll. Abr. 296. Cro. Car. 339.
7. Vent. 220. 1. Sid. 248.

(b) 2. Lutw. 1042.

(c) EYRE, *Justice*, upon the first argument in this case, said that this case had been denied.—NOTE to former edition.

(d) Hilary Term, 12. Ann.

(e) Easter Term, 1. Geo. 1. in the king's bench.

(f)

(g) The court of king's bench will take notice of those customs of the city of *London* which have been properly certified by the mouth of THE RECORDER, *Blacquiére v. Hawkins*, Dougl. 378. but the custom that an action will lie for calling a woman "whore" has not been certified, *Staunton v. Jones*, Dougl. 380. *notis*.

HODGKINS
against
CORBETT.

EYRE, *Justice*. An action lies in *London* for words tantamount : In the case of *Smith v. Smith* (a) a libel was for these words, "*she was never married; what is her hopeful son?*" and a prohibition was granted upon a suggestion of the custom of *London*.

THE COURT took time to consider until the last day of the Term, when they granted a *prohibition*; for the words are a certain charge of incontinency, which are actionable by the custom of *London*. The case of *Houblon v. Milner* is good law, for there the words were, "*thou art a common woman*;" which do not amount to calling "*whore*." *Milbourn v. Povey* is a case in point.

So in the principal case the *prohibition* was held good, and the *consultation* was denied (b).

(a) Mich. Term, 11. Will. 3.

Lockey v. Dangerfield, 2. Stra. 1100.

(b) See *Vicars v. Worth*, 1. Stra. 471.

Theyer v. Eastwick, 4. Burr. 2032.

Case 79.

Lowther and his Wife against Kelly.

In an action of covenant by husband and wife, if the death of the wife *puis darrein continuance* be pleaded in abatement, the Court will not quash the plea; but the plaintiff may proceed by suggesting the death on THE ROLL.

Ld. Ray. 1418.

1. Stra. 795.

2. Com. Dig.

Abatement

(ii. 33.).

MR. LOWTHER, the now plaintiff, being seised of the lands in right of his wife, gave, whilst he was in *Barbadoes*, a letter of attorney to *W. R.* empowering him to demise the land. *W. R.* by virtue thereof, and the power therein given, by indenture in his the said *W. R.*'s own name, made a lease of a house to the defendant, rendering rent to the plaintiffs, in which lease *Kelly*, the defendant, covenanted with the plaintiffs to pay the rent.

And now in an action of covenant brought upon this indenture by *Lowther* and his wife, who were no parties to the indenture, the breach assigned was, for non-payment of rent, &c.

But the wife having died since the *last continuance*, the defendant pleaded that matter *in abatement*.

Verdict for the plaintiff, and motion in arrest of judgment.

IT WAS INSISTED for the plaintiff, that the action survives, by suggesting the death of the wife upon THE ROLL; and this is by virtue of the statute 8. & 9. Will. 3. c. 11. by which it is enacted, "That where there are two or more plaintiffs or defendants, and one or more of them shall die, &c. the writ or action shall not abate, but such death being suggested on the roll, the action shall proceed," and therefore this plea in abatement ought to be qualified.

* [116]

* But THE COURT would not quash it upon a motion.

THE PLAINTIFF therefore suggested this matter on THE ROLL according to the statute, and so proceeded in the action.

THE QUESTION upon the pleadings was, Whether the plaintiff could maintain an action of covenant upon this indenture?

IT WAS ARGUED that he could not, beause he was not a party to the deed, but a mere stranger to it; and the reservation of the rent was to a stranger, and so was the covenant to pay it; and such a covenant cannot be good to one who is no party to the deed (*a*). Therefore he who has a letter of attorney to act for another, if he make a lease in his own name (as was done in this case) such lease is void, for it should be made in the name of him who gave the power and commission to act in his behalf (*b*). It is true, in a deed-poll there may be a covenant in behalf of a third person, but not in an indenture; therefore where there is a covenant between *A* and *B*. that such a sum of money shall be paid to *C*. this is not good (*c*): so that this being a covenant or contract in an indenture, no man can take advantage of it but he who is a party to it. The master cannot have an action against the defendant for hiring his servant to work with him (the defendant), without shewing that the contract was made with him (the plaintiff). So where the cattle of the master were sold by his servant, and a bond taken in the servant's name for payment of the money, but to the use of the master, and he brought the action upon this bond, it was adjudged that it would not lie (*d*), because he was no party to the bond, for he could not release it. So where one *Parry* was indebted (*e*) both to the plaintiff and the defendant, and *W. R.* was indebted to *Parry*, and the defendant promised that in consideration *Parry* would permit him to sue the said *W. R.* he would pay the debt due to the plaintiff, and upon an action on the case brought on this promise, and *non assumpsit* pleaded, the plaintiff had a verdict, but could never get judgment, because he was a stranger to the consideration; and in this case it was laid down for a rule, that no person shall recover upon an agreement but he who is party or privy to the consideration thereof; therefore where a man promised the father to pay his daughter forty pounds (*f*) at or upon her marriage-day, and she afterwards * married, and the husband and wife brought the action for the forty pounds, it was adjudged, that it would not lie, but that the father alone, to whom the promise was made, should bring the action.

ON THE OTHER SIDE it was argued in behalf of the plaintiff, that there is no reason why a person with whom a covenant is made should not be intitled to an action for breach thereof, though he be no party to the deed. The rule of law is, that no person

If *A*. being seised of lands, give a letter of attorney to *B*. to make leases, and he grant a lease to *C*. in his own name, in which *C*. covenants to pay the rent to *A*.; *Quære*, Whether *A*. can maintain an action of covenant against *C*. on this deed?

5. Com. Dig. "Pleader" (2. V. 2.).

2. Lev. 74:

* [117]

(a) Co. Lit. 52.

(b) See Moor, 818. 9. Co. 77. a. and the case of *Frontin v. Small*, 2. Ld. Ray. 1418. S. C. 2. Stra. 705. where it is adjudged accordingly.

(c) Co. Lit. 47. 2. Roll. Abr. 448. 450. 453.

(d) Cro. Jac. 657. See also *Offley v. Ward*, 1. Lev. 235. *Gilly v. Copley*, 3. Lev. 136.

(e) *Bourn v. Mason*, 1. Vent. 6.

(f)

LOWTHER
AND HIS WIFE
against
KELLY.

can take an estate *in præfenti*, unless he be a party, and yet if such interest pass by way of use, he may take without being party. There are many resolutions in parallel cases to support this action; as for instance, the case *Dutton v. Ingram (a)*, which is reported in several books, and was thus: The plaintiff declared, that his father-in-law being seised in fee, &c. and being about to sell timber to raise a portion for his daughter (who was the plaintiff's wife), the son and heir on whom the lands would descend after the death of the father, promised the father, that in consideration he would forbear to cut down the timber, he the son (the now defendant) would pay the daughter one thousand pounds, and for non-payment of this money the action was brought by the husband and wife, and they had a verdict and judgment; but upon a motion in arrest of this judgment it was objected, that this action ought to have been brought by the father, to whom the promise was made: to which it was answered, that though the promise was made to him, yet he was not concerned in the meritorious act; and that there being such a nearness of relation between the father and the daughter whom the plaintiff had married, that he the plaintiff is now concerned in the very promise made to his father-in-law. So where the father of a young woman (b) promised the father of a young man, that in consideration he would settle such a jointure on her, he (the father) would give his son two hundred pounds more upon his marriage with the daughter; in this case it was adjudged, that the son though he was a stranger to the promise (for that was made to his father) might bring the action, because the meritorious act was done by him, viz. the marrying the daughter; but in the case of *Mason v. Bourn (c)*, before-mentioned, the plaintiff did nothing of any trouble to himself, or of any benefit to the defendant. So where the defendant promised the plaintiff (d), who was a physician, that if he performed such a cure, he would give him (the physician) so much money, and so much to his daughter, it was adjudged, that the daughter might bring an action for her money, though she was a stranger to the promise, and likewise to the consideration, because the nearness of * relation between father and daughter gives her the benefit of the consideration for her father's performance.

* [118]

PRATT, *Chief Justice*. By a deed poll a man may demise to or covenant with another person, and an action lies; and yet there are no parties to such deed.

EYRE, *Justice*. Every contract is made between parties: a letter of attorney may be contained in an indenture without making the attorney a party, because in that case no interest passes to the attorney.

Adjournatur.

(a) 1. Vent. 318. 2. Lev. 210.
Raym. 302. T. Jones, 102.
(b) Lenn v. Hayes, Moor, 550.

(c) 1. Vent. 6.
(d) T. Raym. 67.

THE PRACTICE of the court of king's bench is, for the plaintiff in ejectment to deliver a copy of the declaration to the tenant in possession, or to his wife, with an indorsement in *English* of the substance of such declaration, &c. and if the tenant do not appear in the beginning of the next Term, then, upon affidavit made of the delivery of the copy of the declaration affixed to such affidavit, and of reading the indorsement, or of acquainting the tenant with the contents thereof, the Court will make a rule for the tenant to appear and plead on a certain day; at which time, if he appear, he must, by his attorney, file common bail, and enter into a rule to confess *lease, entry, and ouster*, and leave it at a Judge's chamber, and give notice thereof to the attorney for the plaintiff, that he may proceed. But if the tenant in possession do not appear, then after the day appointed by the Court for his appearance, and to plead, judgment by default shall be entered against the casual ejector.

Error in the exchequer-chamber will not lie upon a judgment in ejectment against the casual ejector.

IN THIS CASE, a declaration in ejectment was delivered, and a rule made for the tenant in possession to appear and plead, which he did, &c. (a) and afterwards withdrew his plea, and confessed judgment, which the plaintiff entered against the casual ejector.

And now the tenant in possession moved by his Counsel to set aside this judgment.

The reason was, because he might bring a writ of error, for no such writ would lie on a judgment against the casual ejector, therefore the judgment ought to be entered against the tenant himself; for wherever the defendant is in court, the judgment must be entered against him, and not against the casual ejector; now here he was in court, for he appeared and pleaded to issue, and might come in at any time, and confess *lease, entry and ouster*, &c. And if the judgment had been entered against the tenant, it had been better for the plaintiff than to have it entered against the casual ejector, because in such case the plaintiff will have his costs, and will be entitled to an action to recover the value of the * mesne profits in damages, which he can never recover by a judgment against the casual ejector.

* [119]

THE COURT enquired of the master of the office, what was the practice of the Court in such cases; and both he and several old practitioners affirmed, that the practice was to enter judgment against the casual ejector, and that he had often denied to sign

(a) *Quare*, Whether he pleaded "not guilty," and then withdrew his plea; or, whether the plaintiff's attorney made up the paper-book with "not guilty;" and when he came to deliver it to the defendant's attorney, he refused to plead "not guilty," and struck it out of THE

PAPER-BOOK, and gave a *cognovit actionem* with judgment against the tenant in possession, at the same time giving notice of a writ of error brought in the name of the tenant in possession. — NOTE to the former edition.

SMITH
against
JONES.

judgment against the tenant in possession, unless he had pleaded; it is true, he pleaded in this case, but afterwards he withdrew his plea; and though he had pleaded, yet he is not a defendant until he enters into a rule to confess *lease, entry and ouster*; for then, and not before, he is a complete defendant, and may plead to issue; but whether he appears or not, yet judgment shall be entered against the casual ejector; it is true, it is sometimes entered against the tenant in possession, but that is by consent of the parties, and upon a promise not to bring a writ of error.

THE CHIEF JUSTICE was of opinion, that there was no instance of a judgment being taken against the tenant in possession for want of a plea; that words of the rule are positively certain that judgment shall be entered against the casual ejector. He was doubtful in this point. It is the right of the subject to give judgment by confession. It is likewise his right to bring a writ of error upon such judgment, of which right he cannot be deprived by a rule of this court, or by any other court whatsoever. Now the intent of the rule, for the tenant in possession to appear on a certain day, and plead, is only to bring him into court; that when he comes in, he may confess *lease, entry and ouster*, but not to strip him of that right to which he is entitled by law, as it will if this judgment should stand against the casual ejector, because no writ of error will lie in THE EXCHEQUER-CHAMBER upon such judgment. This way of delivering an ejectment is in nature of process to compel the tenant to appear in court, and was first instituted in the Lord Chief Justice *Roll's* time, and never questioned until now. There is a difference between appearing and pleading, and appearing and not pleading at all.

EYRE, *Justice*, was clear for the plaintiff, that judgment should be entered against the casual ejector, but the other three were doubtful.

So it was adjourned.

Case 81. The King *against* The Inhabitants of the County of Surrey.

Information for
not repairing a
county bridge.

UPON A MOTION made to discharge a rule for AN INFORMATION against the inhabitants of the county of *Surrey*, for not repairing a bridge;

* [120]

IT WAS ALLEGED, that the parishioners of *Mitcham* in that county ought to repair it, which they had done time out of mind. It is true, that *parish* had obtained a verdict against *the county*, but it was by surprize; * for by certificates and other records of the sessions, it will appear that this parish ought to repair this bridge; and that they had been fined for not repairing; and that they had acquiesced under that charge many years.

Hilary Term, 9. Geo. 1. In B. R.

IT WAS INSISTED *for the parish*, that admitting they had repaired this bridge, yet if they were not obliged so to do, either by *prescription* or *tenure*, they shall not always be liable. They cannot be obliged by *prescription*, because the inhabitants of this parish are not a body politick, and it is not pretended that they are obliged by *tenure*.

THE KING
against
THE
INHABITANTS
OF THE
COUNTY OF
SURREY.

TO WHICH it was answered, that an information against the county in general was the only way to try the right; for though this parish might not be obliged to repair the bridge, yet some other parish might; and since the county is *prima facie* bound to repair it, it is probable that when the information is exhibited against them, the inhabitants of *Mitcham*, to excuse themselves, may shew who is obliged to repair it.

And THE COURT being of that opinion, the rule was made absolute.

Mosse against Bennet.

Case 82.

TRESPASS ON THE CASE against the defendant, for disturbing the plaintiff in his common; wherein he set forth, that the defendant had covered three acres of the common field with hurdles, and had inclosed three acres more, &c.

A justification in trespass, stating that A. was seized in fee of the place where, and made a lease for life thereof to the defendant, by virtue of which he entered, &c. is good. 1. Bac. Abr. "Common" (C.).

The defendant pleaded, that THE COLLEGE of *Newelme*, in the county of *Oxford*, was seized in fee of the lands in the declaration mentioned, and being so seized, made a lease thereof to the defendant for life, and that he (the defendant) had a right by prescription to have A FAIR on the said common every year on such days in the year, and to have hurdles to keep and inclose cattle there, and a right to so much ground on the said common as would keep the said hurdles from fair to fair, and so justifies the inclosing three acres with hurdles, and the covering three acres *cum cratibus prædict.* and avers it to be the same trespass.

And upon a demurrer to this plea,

IT WAS OBJECTED, that it was ill and repugnant, because a *seisin in fee* was laid in THE COLLEGE, and an estate for life in the defendant.

But it was disallowed; for it is good *reddendo singula singulis*.

THEN IT WAS OBJECTED, that the defendant had justified the inclosing three acres, and the covering three acres, but did not say, that the covering was *in aliis tribus acris*, so that the plaintiff having declared for a disturbance in six acres, * the defendant had only justified in three acres.

A justification in trespass for inclosing three acres and covering three acres, must say that the covering was *in aliis tribus acris*.

THE COURT held this to be a fault incurable; and the rather, because this being an action on the case for disturbing the plaintiff in the enjoyment of his common, the defendant might have pleaded the *general issue*, and have given this *special matter* in evidence.

* [121]

EASTER

E A S T E R T E R M,

The Ninth of George the First,

I N

The King's Bench.

1722.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powis, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Sir Alexander Anstruther *against* Christy.

Case 83.

AN ACTION OF DEBT was brought in the court of common pleas upon a contract for payment of money on SOUTH-SEA ARTICLES, at the end whereof the parties bound themselves to each other in such a sum, for the true performance thereof, &c. The plaintiff had judgment.

Writ of error no *superfedeas*, unless the plaintiff in error put in bail.

S. C. Bunb. 178.

The defendant brought a writ of error in the king's bench.

The plaintiff in the action insisted, that this writ of error was no *superfedeas* to the execution on the original action, unless the plaintiff in error had put in bail according to the statute 3. Jac. 1. c. 8. Now as to that matter, it is true, that he did put in bail, but the plaintiff in the original action excepted against them as insufficient; and nothing farther was done in order to justify them, or to put in other bail; and certainly he shall not be concluded by the giving insufficient bail, as they on the * other side * would have it; and compared it to the case of *Reeve v. Pike (a)*,

[122]

SIR
ALEXANDER
ANSTRUTHER
against
CHRISTY.

where, after the defendant had put in bail, he moved that they might be discharged; but it was denied. Now this being an action of debt founded on a contract for payment of money; therefore by the very words of the statute *bail* is requisite on a writ of error of the judgment on such action, otherwise that writ is no *superfedeas* to the execution. It is requisite on an action of debt on a *nomine pænæ* in a lease, though it is otherwise in replevin or covenant; and the reason why it is not required of an executor who brings a writ of error, is not because it is not requisite in the original action, but because they are supposed to be ignorant of the estate of the testator.

ON THE OTHER SIDE it was argued, that this writ of error was a good *superfedeas*, and that it is not necessary to put in bail on such a writ, it being brought on a judgment obtained on a bond for non-performance of covenants (a); for whether the debt is on a directly due on the bond, or any other agreement, but accrues upon the non-performance of something collateral to that on which the action is founded, there no bail is requisite (b); and this is a bond for payment of money for non-performance of articles; it is true, the bond itself is included in the very articles, but there is no material difference between such an obligation and a bond or note, with a condition to performance of articles; for wherever the action is founded on the articles, there bail is not requisite; and so is the case of *Biddolph v. Temple* (c).

THE COURT. The statute requires, that where an action is brought on a single bill or bond, or contract for payment of money only, that in such case bail shall be given; which implies, that it is not requisite in any other bond or contract: it is true, this is a contract, but it is not for payment of money only, but to pay it upon non-performance of an agreement, and so not within the provision of this statute. But though bail be not requisite to the original action, yet it must be given upon a writ of error of a judgment obtained in such action; as for instance, if an action should be brought in the court of king's bench for five pounds, there bail is not required; but if judgment be obtained in that action, and a writ of error brought, certainly bail must be put in.

So judgment was given, that this writ of error was no *superfedeas*, unless good bail was put in.

(a) 2. Bulst. 53. Yelv. 227.

(c) 1. Lev. 260.

(b) Cro. Jac. 350. Cro. Car. 509.

* The King against Wiatt.

Case 84.

UPON A MOTION for an *attachment* against the defendant for publishing a libel against a *doctor of divinity* in the university of *Cambridge*, a rule was made upon him to shew cause on such a day why it should not be granted.

If a rule for an information be granted against the printer and publisher of a libel, and the author appears and avows himself, the Court will discharge the rule against the printer and publisher, and direct it against the authors.

He now moved by his Counsel to discharge that rule, upon an affidavit that his fault was not wilful, but merely through ignorance; that he had the libel from one *Crownfield*, a printer in *Cambridge*; that it was in *Latin*, which the defendant did not understand, and that he did not know who was the author, otherwise than by a letter which he received from the printer, and which was now annexed to his affidavit, by which letter it appeared, that one *Dr. Middleton* was the author: so that having shewed how he came by this libel, and having told all that he knew of the author, for that reason it was insisted in his behalf, that the rule should be discharged, and that the printer should be prosecuted.

But the rule was continued on the defendant until he made out his allegation against the printer, who was therefore joined in the rule, that both of them might be before the Court.

In the next Term *Dr. Middleton* (a) appeared, and confessed in court that he was the author of the book.

And thereupon the rule was discharged against the defendant and the printer; and the doctor was committed until farther consideration of the matter.

And within a few days afterwards he was brought into court, and fined fifty pounds, and bound to his good behaviour for a year.

And so was *Dr. Colbatch* the same Term, for the like offence.

(a) See Fortescue Rep. 201.

Goodright against Opic.

Case 85.

EJECTMENT. Upon *not guilty* pleaded, the jury found the defendant *not guilty* as to part, and as to the other part there was a special verdict, the substance whereof was thus:

The testator being seised in fee of several lands, did, in the year 1705, devise "all his said lands" to five persons (naming them), and to their heirs, as *tenants in common*; that *John Paine*, one of "fore bequeathed, and all his money, household goods, plate, and all his estate real and personal, of what nature or kind soever, to D. and E. in fee;—*Quæritur*, If C. die in the life of the testator, whether the lapsed third part of his estate in fee shall pass to D. and E. as *residuary legacies*, or to the heir at law of the testator?—12. Mod. 592. 1. Will. 333. Cowp. 299.

GODBRIGHT
against
OPIE.

the said devisees, died two years before the testator, * who, by another clause in the will, devised "all his *other* messuages, lands, &c. not therein before given, devised, or bequeathed," and "all his money, household goods, plate, rings, &c." and "all his estate real and personal whatsoever, of what nature or kind soever," to his two nieces *Mary Buce* and *Mary Opie*, their heirs, executors, and administrators; that the testator died without making disposition of the said fifth part of his lands, otherwise than by his last will as aforesaid.

The question was, Whether the same should descend to the heir at law of the testator, as not being disposed by him in his life, because the devisee died before him; or, Whether it should pass to *Buce* and *Opie* as residuary legatees by the latter clause of the will, as an estate not before disposed by the testator?

THOSE WHO ARGUED *for the lessor of the plaintiff*, who was heir at law, insisted, that this fifth part of the lands should descend, because it could not pass by any possibility to the first devisee, for he was dead before the testator; therefore it must necessarily revert in him, and by consequence must descend to his heir at law; that there is no case wherein it has been resolved, that a residuary legatee in a will shall carry the lands which have been before disposed by the same will, though it should happen that they cannot pass to the first devisee, either by reason of death or any other incapacity; that wills are commonly guided by the intention of the testator, and that there was not a word in this will which shewed he intended these lands should pass to the residuary legatees; neither is it pretended by them that he knew the first devisee was dead. Now it is a settled rule in the construction of wills, that both as to the persons taking, and as to the estates which they take, all must arise from the intention of the testator, which intention must be collected out of the words of the will itself: now here are no words in this will which import that the testator intended these lands should pass to residuary devisees. This being premised, and it plainly appearing by the first clause of this will that the testator had disposed "all his lands," therefore the words "real and personal estate," in the last clause, shall be intended a devise of his chattels real; for it is absurd to say, that what he had before devised to one in fee should go over to another (a). Besides, he having devised "all other his real and personal estate not before devised," there the word "other" is a relative, and cannot refer to any lands before given, but makes that clause as strong as if he had excepted the lands before devised, by particularly naming them, because there must be * *other lands* to satisfy that word, and which were not devised before; but the lands now in question were devised before. But admitting it to be the intention of the testator, that the fifth part of his lands should pass to the residuary legatee, yet if the words in the will be not apt for that purpose,

* [125]

(a) See the case of *Wilkinson v. Maryland*, Cro. Car. 447. 449.

those lands will not pass ; and so it was resolved in the case of *Steed v. Berrier* (a). The case which comes nearest this point, and which probably may be objected on the other side, is the case of *Wheeler v. Watson* (b) : The testator devised a manor to T. S. for six years, &c. and afterwards by the same will he devised " all the " rest of his lands in *Somersetshire*, or elsewhere, to his brother " and his heirs ; " it was adjudged, that the reversion after six years passed ; but in that case, and some other of the like nature (c), it appears in the wills themselves, that the testators had other estates to dispose, and that they used sufficient and apt words to pass them.

GOODRIGHT
against
OPINION.

S. C. cited in 3.
Mod. 228.
6. Mod. 111.
2. Ventr. 286.
Fortesc. Rep.
227. 229.
3. Wil. Rep. 63.

E contra. The question was truly stated on the other side, viz. whether the fifth part of the testator's lands should descend to the heir at law, or pass over to the residuary devisees as not disposed before, because *John Paine*, one of the five devisees, died in the life-time of the testator, and by consequence it could not pass to him ; but it seems plain, that it shall pass to the residuary devisees by the last clause of this will, because at that very time when it was made it was not disposed to any other person whatsoever ; for it was then the estate of the testator, and could not be the estate of *John Paine*, because he was then dead ; therefore it must necessarily pass by the last clause in the will, as the real estate which the testator then had, and which he had not disposed before. As to the word " other," it is restrained to that very clause by which the testator devised his chattels, and cannot refer to a devise of his real estate of any kind whatsoever, because it was a devise to the residuary devisees and their heirs ; now it had been in vain for the testator to have mentioned the word " heirs," if he had not intended the lands should pass to them. And as to such intention, it may reasonably be collected out of the words of this will, that he did intend they should pass ; for otherwise he might easily have worded the clause in this manner, " and all other my " real and personal estate not before-mentioned," instead of " not " before * disposed ; " so that his intention seems to be, that if, by any accident interposing, his land should not pass to the first devisees, then they should pass over to the second devisees, as a *residuum* not before disposed. And though probably a lawyer might have used other words than the testator had done in this will, yet that is not to be considered where his intention is so plain ; for if the form is not good, yet his intention being clear that will help the form ; but in this case the whole will is good and formal, and there is no room to object that it is not so. It is true, it was objected by the Counsel for the plaintiff, that it is absurd to say, that after the testator had devised his lands to one in fee, that they should go over to another ; but this is misrepresenting the case ; for it is no otherwise to go over than in case any accident should happen, that they should not pass to the first speci-

* [126]

(a) Raym. 408. Ventr. 341. 2. Mod. 313.

(b) Allen, 28.

(c) 1. Lev. 212. 1. Saund. 180.
2. Ventr. 285.

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fic devisee; as if the testator should devise a particular sum of money to one, and all the rest of his personal estate to another, and it should happen that this particular legacy could not pass to that legatee, shall not the residuary legatee have it before the executor? Certainly he shall; and yet in that respect the executor has the same right to chattels as the heir has to lands; and as for cases, there are none in point.

THE COURT. An executor has not the same right to the personal estate as the heir at law has to lands, because an executor is no more than a trustee made by the testator (a), but an heir is to sit in the seat of his ancestor. But as to the principal matter, if a particular estate for life had been devised to *J. bn Paine* (who died), with remainder over, such a remainder had been good; and so is *Perkins*, 108. b. 109. a. and so should this; and there is no objection against it, but that it does not appear in the will that the testator had anything to dispose, he having devised "all his lands" before, by the first clause in his will, to five persons and their heirs.

No judgment was given (b).

(a) See the case of Sir Richard Raines, Carth. 458. *Warrington v. Langham*, Prec. in Chan. 50. *Nicholas v. Nicholas*, Prec. in Ch. 547. and 11. Mod. 162. accordant.

(b) See the case of *Wright v. Horne*, post. 221.

* [127]

Case 86. *The King against Mayor and Burgeffes of Tregony, &c,

Previous to 11. Geo. 1. c. 4. f. 1. if a particular day was appointed by the charter of a corporation for the election of a mayor or other corporate officer, with a power of holding over, they could not proceed to such election on any other day in the year, except on the death or removal of the mayor for the time being.

A MANDAMUS was directed "To the mayor and burgeffes of Tregony" to choose a MAYOR, and swear him into that office. They return, that the borough of Tregony was incorporated by letters patent of king James the First, by which it was provided, that the mayor and burgesffes shall for ever after proceed to elect a new mayor on the Tuesday next after Michaelmas-day every year, and that the new mayor thus elected shall be sworn by the mayor in being before he goes out of his office, and that every mayor so chosen shall continue in that office until another be duly elected in manner as aforesaid; and they farther returned, that the day of election appointed by their charter being past, they could not proceed to a new election, unless on the death or removal of the present mayor, &c.

IT WAS INSISTED for a *peremptory mandamus*, that they might proceed to a new election, though the day for that purpose, appointed by their charter, was past, because that day was only directory; for if the mayor should be sick on that day, or out of town, yet they might proceed to elect a new mayor at any other time. In the case of *Hicks v. the Town of Launceston* (a), in Cornwall, it was held, that if the king incorporate a town by the

S. C. ante, 111. Post. 132. Stra. 354.

(a) In the king's bench, in Easter Term, 8. Car. 1. 1. Roll. Abr. 514.

name of "mayor and eight aldermen," with a clause in the letters patent, that upon the death or removal of any alderman it shall be lawful for the mayor and the rest of the aldermen, within eight days after such death or removal, to elect another alderman in his place, they may, though no election be within the eight days, choose another at any time after, because such a power is incident to the corporation created; and the affirmative power which they have by the charter itself to choose within eight days, &c. does not take away the power which they have by implication as incident to the corporation.

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TREGONY, &c.

ON THE OTHER SIDE it was argued, that there being no exception taken to this return, it must therefore be good. And as to the other point, there cannot be an election but on the very day appointed by the charter, unless upon the death or removal of the mayor. * In these cases a *mandamus* is usually granted to fill up the body incorporated, for the sake of the inheritance and succession; but here the corporation is full, so there is no occasion to go to a new election of a mayor. Now it being returned, that the day of election appointed by their charter is past, they cannot proceed to a new election, unless on the death or removal of the present mayor. If this be not true, then it ought to have been traversed on the other side (a); and the mayor and burgeses might have taken issue, or have demurred; and upon a verdict or judgment on the demurrer, they might have damages and costs as in an action on the case; and there being neither a traverse nor demurrer to this return, this is a good answer why no *peremptory mandamus* shall go.

* [128]

Then IT WAS OBJECTED to this first writ of *mandamus*, that it was not well directed; for it was, "To the mayor and burgeses" "to elect and swear a new mayor;" where the power of administering an oath is in the mayor only. It is true, a *mandamus* is not to be superseded without a return first made, because by a return the fact ought to appear judicially before the Court; but where there is a return, as in this case, and it appears that the writ is wrong directed, in such case it ought to be quashed. The difference is very plain between a writ to elect and a writ to swear another into an office; for the one may be directed to the whole body corporate, but the other must be directed to him alone who hath power to administer an oath, and nobody can have that power but by special words from the king. Therefore this *mandamus* cannot be good, because the execution thereof would subject the person executing it to an information, for usurping an authority where he had none.

A *mandamus* commanding the mayor and burgeses to elect and swear in is good, although the mayor alone is authorized to administer the oath of office.

THE COURT. Here are two objections made to this *mandamus*: FIRST, that the writ is not good; and, SECONDLY, that the corporation cannot proceed to choose a new mayor on any other day than the very day appointed by the charter.

(a) See 9. *Alere*, c. 20. f. 2.

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* [129]

The objection to *the writ* is, that it is directed "To the mayor and burgeses to elect and swear a new mayor," which is wrong; for though the mayor and burgeses are to elect, yet it is the mayor alone who must administer an oath to the person, for the burgeses cannot; therefore this direction is wrong. But this may receive a very plain answer by a reasonable construction of the matter distributively in the manner as directed by the writ, the words being "*eligant et jurentur secundum auctoritatem vestram*;" so that it is a writ to the body corporate to elect, they having the inheritance as to the election of a mayor; and it is a writ to the mayor, who has a special power to swear the person elected into the office; so that *reddendis singula singulis*, the writ is well directed. And it could not be otherwise, unless there had been two writs granted, the one to elect, and the other to swear the person elected; so that this being a ministerial writ is so far good. It is true, all to whom the writ is directed are to do something, viz. they are to elect, and to be present when the person elected is to be sworn; and there is no material difference between one man being sworn by another, and being sworn in the presence of another; so that those who are present when the new mayor is sworn may so far be said to have a power to swear him, for the mayor himself does no more than being present, it being usual for *the town-clerk* to administer the oath.

So that THE CHIEF QUESTION in this case is, that where a certain day is appointed by the charter for the mayor and burgeses to proceed to the election of a new mayor, and that day being past, whether they can elect on any other day in that year.

And THE COURT was of opinion, they could (a) not, unless upon the death or removal of the mayor in being; for if they should elect on any other day, it is not *secundum auctoritatem* given by the charter. And there can be no inconvenience if they should stay till another day appointed by the charter for them to choose a new mayor, because it is expressly provided, that the mayor elected shall continue in his office until another is duly chosen, which cannot be but upon the very day appointed, as aforesaid; for where they have no power by their charter to chuse on any other day, their corporation shall be dissolved rather than they should make an election on another day; and this Court cannot compel them to chuse a mayor on any other day, where there is a mayor already in being (b).

So a *peremptory mandamus* was denied.

(a) By 11. Geo. 1. c. 4. s. 1. if no election shall be made upon the day, or within the time appointed by charter or usage for such election, the members of

the corporation who have a right to vote may proceed to an election in the manner directed by the statute.

(b) See 9. Anne, c. 20. s. 8.

Waller's Case.

Case 87.

THE COURT was moved to stay proceedings on a *scire facias* brought against the bail, there being a writ of error depending in THE EXCHEQUER-CHAMBER.

The proceedings in *scire facias* against bail shall be stayed on their confessing judgment, and entering into a rule to pay the debt, or deliver up the principal within four days after judgment affirmed.

THE COURT. * The rule in the case of *Myer v. Arthur (a)*, upon a motion in this court in *Easter Term*, in the seventh year of *George the First*, was, that if the defendants in the *scire facias* will confess judgment, and enter into a rule to pay the debt, or to deliver up the principal within four days after the judgment shall be affirmed, the proceedings on the *scire facias* shall be stayed.

THE CHIEF JUSTICE was of opinion, that the like rule should be made in this case. It is true, the plaintiff in the *scire facias* is to have judgment immediately against the bail, but he is tied up from suing out execution until four days after the judgment shall be affirmed, and then, on non-payment of the debt, or not rendering the principal, he is at liberty to take out execution, and by this means expences will be saved on both sides (b).

(a) 1. Stra. 419.

Cole v. Buckland, 2. Stra. 872.

(b) See Aldridge v. Snowden, post.

Richardson v. Jelly, 2. Stra. 1270.

131. Everett v. Gray, 1. Stra. 443.

Capron v. Archer, 1. Burr. Rep. 340.

Aldridge against Snowden.

Case 88.

THIS was likewise a motion to set aside a judgment against the bail, where the second *scire facias* against them was returnable on the thirteenth day of *May*, and the writ of error was allowed on the same day, and notice given between three and four o'clock, the same day the bail surrendered the principal, and then judgment was obtained against the bail; and for an authority in point, the case of *Myer v. Arthur (a)* was cited, where it was resolved by this Court, that after a writ of error is brought on the principal judgment, the proceedings upon a *scire facias* against the bail shall stay, and the bail shall have four days after the affirmance of the judgment, to render the principal, or pay the condemnation money; and upon the authority of this case, a rule was now made for the plaintiff to shew cause, &c. why the judgment should not be set aside, and all further proceedings stayed.

Upon another day a motion was made to discharge that rule, because the bail ought to render the principal, &c. on the very day that the second *scire facias* was returnable, otherwise the plaintiff must have judgment, and it ought not to be set aside. It is true, the bail have brought a writ of error on the very last day allowed by law for them to render the principal, and gave notice thereof about three of the clock in the afternoon, but did not render the

(a) Easter Term, 7. Geo. 1. 1. Strange, 419.

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against
SNOWDEN.

principal till nine days afterwards (a), which cannot discharge the bail; neither is it any foundation to set aside this judgment against them.

* [131]

* THE COUNSEL for the bail likewise cited the case of *Myer v. Arthur* to prove, that they ought to be discharged, for in that case the second *scire facias* was returnable the thirteenth day of February, which was the last day of *Hilary Term*, and notice given, that a writ of error was allowed two days before; and the plaintiff intending to proceed on the second *scire facias* was stopped upon a motion. It is true, the tender of the principal on the day the second *scire facias* is returnable, would be too late, if the writ of error did not help it; but that being brought before the return of the second *scire facias*, the bail hath time until four days after the affirmance of the judgment.

TO WHICH it was answered, that this judgment was regular; and though, if the bail had come before the return of the second *scire facias*, and moved the Court that proceedings might be stayed against them, there might have been some indulgence; but when they did not make any application till after the judgment was signed, it ought not now to be set aside.

PRATT, Chief Justice. Application to stay proceedings against bail, by reason of a writ of error brought by the principal, ought to be made before judgment signed; for such writ of error of itself is no *superseas* to the proceedings against the bail. However, on the circumstances of the case, since notice was given of the allowance of the writ of error, I think in reason and equity the judgment ought to be set aside, paying costs. The bail may surrender the principal at any part of the day of the return of the second *scire facias*.—He was of opinion, that it was necessary to move the Court to stay proceedings; and if they could be stayed upon a motion, then if the defendants paid costs, and the plaintiff was put in as good a condition as if the motion had been made in time, the Court may stay the proceedings, though the motion was made out of time; and the rather, because it is against the bail, who ought to be favoured as far as possible.

FORTESCUE, Justice. Such surrender on the return-day of the last *scire facias* must be made *scilicet Curia*. This judgment against the bail is strictly regular, and ought not to be set aside. The staying the proceedings against the bail, when the principal brings a writ of error, is merely an indulgence of the Court, even when the bail move in time. All the proceedings are past, for judgment is obtained. This case differs from the common motion to stay proceedings on the bail-bond; for that is never granted but by making the plaintiff secure of his debt if he recover; for the

(a) *Quare*, if they did not surrender the principal on the very same day, and even before judgment signed; but however, it is certain that the surrender could

not be made till after the regular time allowed for that purpose was expired; because otherwise the motion had been needless.—NOTE to the former edition.

Easter Term, 9. Geo. 1. In B. R.

judgment on the bail-bond stands as a security for the debt. When proceedings against bail are stayed on a motion made in proper time, if the judgment is afterwards affirmed, the bail are allowed four days to surrender the principal after such affirmance.

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THE COURT made a proposal to set aside the judgment, if the bail would be bound to pay the debt absolutely (without an election to pay the debt or surrender the principal) if the judgment should be affirmed.

Which not being agreed to, the rule for shewing cause was discharged.

TRINITY TERM,

The Ninth of George the First,

I N

The King's Bench.

1723.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

• [132]

The King against Alexander John.

Case 89.

UPON A MOTION in *Trinity Term* last, a rule was made for the defendant to shew cause why AN INFORMATION in the nature of a *quo warranto* should not be granted against him, to shew by what authority he came to be mayor of *Lestwithiel*, in the county of *Cornwall*.

Formerly, the Court would grant an information *quo warranto* to try the right by which a corporator held his office, although he had been sixteen years in quiet possession of it.
Post. 166.

In *Hilary Term* following cause was shewn, that by the charter of incorporation a mayor is always to be elected out of the capital burgeses, to continue in his office until a new mayor be duly chosen; that the defendant, the present mayor, was never a capital burges, and consequently could never be duly chosen mayor out of those burgeses; and therefore is no mayor.

The answer was, that he was chosen a capital burges in the year 1697; that as many of the inhabitants as are now living saw he was duly elected, excepting one *John John*, who now complained against him; and that having so long acquiesced under that election, it shall not now be brought in question, it being a standing rule in cases of this nature, that they shall not be examined in such remote degrees; for if they should, then they might enquire whether

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ther the defendant was a freeman before he was a burges, and whether he was a burges before he was a capital burges, which would be very inconvenient ; * that the defendant was chosen mayor in the year 1706 ; and that the corporation, for some differences arising amongst themselves, did not proceed to any election of capital burgesses since that time ; so that this borough wanted a sufficient number of such burgesses to elect a new mayor, and for that reason the defendant had continued mayor ever since.

PRATT, *Chief Justice*, was of opinion, that the fact was plain that the defendant had been mayor of this place for *sixteen years* together, which is a sufficient cause for an information (a) ; so that the rule was made absolute, and the parties were left to try the right upon this information (b) ; though one of the Judges was of opinion, that a *mandamus* to elect a capital burges and a mayor had been a good and proper method.

Afterwards a trial was had upon this information, and a verdict was found for the plaintiff.

IT WAS NOW MOVED to set it aside, and for an *attachment* against *John John* for not producing the corporation-books at the trial, according to a rule of court made for that purpose, and with which he was served (c).

As to the first part of this motion, *viz.* to set aside the verdict, the Court took time to consider it, and that FORTESCUE, *Justice*, would in the mean time consult with *Porter, Baron*, who tried the cause, and report his opinion ; and he afterwards informed the Court, that he had spoke with *the Baron*, whose opinion was, that the verdict was not against evidence, but that the proof was only by one witness, that the defendant was a capital burges duly elected ; and that the evidence that it was not a due election was given by *John John* only, and no more ; and that it was objected against his evidence at the trial, but the objection was over-ruled, and he (*the Baron*) was satisfied with the verdict.

4. Com. Dig.
" Franchises"
(F. 21.).

However, it was moved for a new trial, upon a suggestion that this *John John*, who was the only witness against the defendant, kept the corporation-books from him, so that they could not be produced at the trial, he being served with a rule of this court to produce them ; and it was farther moved, that an *attachment* might be granted against him for a contempt.

It was insisted, that if this verdict should stand, a great inconvenience must necessarily follow ; for it would avoid all the acts of

(a) The opinion of the Chief Justice upon this point was, perhaps, founded on an idea that the right of holding over in this case was affected by the statute 9. Anne, c. 20. s. 8. by which it is enacted, " That no person to whom it belongs to preside at the election, and make return of any member to serve in parliament,

" who hath been or shall be in such annual office for one whole year, shall be capable to be chosen into the same office for the year immediately ensuing."

(b) Post. 166.

(c) See 32. Geo. 3. c. 58. s. 3.

this

this corporation ever since the defendant had been mayor ; for if he was not a lawful mayor, then all the corporate acts done by him are void:

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* THE COUNSEL *on the other side* argued, that this was a good verdict, and given upon good evidence, and ought not to be set aside, or a new trial granted, because the Judge who tried the cause was satisfied with the verdict, and reported that it was given on good evidence ; and that to argue a right from the long possession of this office, when that right had been tried upon an information, and found against the defendant that he had no right, was a new sort of defence, and a very strange one too. It is true, the possession might be given in evidence, that he had a right to vote as mayor, &c. because every officer *de facto* has such a right ; but certainly his right to the office itself can never be determined upon a trial of his right to vote as mayor. It is true, there was a rule made for this *John John* to produce the corporation-books at the trial ; but as to that matter he has positively made oath, that he hath not those books, and that he does not know who hath them, and therefore he shall not be in contempt without a wilful default.

* [134]

THE COURT. There is no room for an *attachment*, because this person has not disobeyed the rule, and a *new trial* shall not be granted, because that would be against the report of the Judge before whom this trial was had, who was satisfied that the verdict was not against evidence ; so that nothing is offered for a *new trial*, but only that the long continuance in the possession of this mayoralty supposes, that the defendant had a right to be mayor, and the inconveniency, if he was not mayor, would be to avoid all the corporate acts done by him as mayor for many years last past. It is true, if the question had been at the trial, whether the defendant had a right to vote, or not, or whether he had taken the oaths or received the sacrament within the time limited by the statute, in such case his being mayor *de facto*, and a long acquiescence under such a mayoralty, would be a strong evidence for him ; but when the question only was, whether he was duly elected into that office, that is a question concerning *the right*, and in such case the long possession of the mayoralty, or the many inconveniencies that would follow if he was not duly elected, ought not to be regarded. So that this verdict being given on good evidence, and so certified by the Judge who tried the cause, shall not be set aside for any of the reasons before-mentioned.

And thereupon * the rule was discharged, against the opinion of FORTESCUE, *Justice*, who was for the possession.

* [135]

The King *against* Harrison.

Case 90.

A N INFORMATION in nature of a *quo warranto* was moved for against the steward of a court-leet, and against the bailiff and the constables, for impanelling a jury not duly summoned, the

Information in
nature of a *quo*
warranto against
a steward of a
leet for impanelling a jury not duly summoned.
bailiff

THE KING
against
HARRISON.

bailiff being the proper officer to summon them, who should be all freeholders, for they only have a right to be jurymen; but there were none summoned, and six other persons who had no right being present in court were sworn of the jury, and six freeholders being likewise in court refused to be sworn, because they were not summoned, neither would they serve with those who had no right to be of the jury, whereupon the steward swore six more; and the jury thus constituted by the steward of twelve persons who had no right to be jurymen, chose the bailiff and constables.

A rule was made for the defendant to shew cause why an information should not go against him.

He shewed for cause, that the six freeholders who appeared in court were duly summoned, but that they refused to be sworn of the jury; whereupon the steward swore a jury out of such persons who were present in court, which he insisted was a good election, which jury chose the two constables and one bailiff of the manor, and that this was the constant course of chusing such officers; and that it would be dangerous to make a precedent of trying the right of chusing such men by a *quo warranto*.

THE COURT. Here is no room for any complaint against the constables or the bailiff; but if any, it is against the steward.

And therefore a rule was made for the steward to attend, and to shew cause why an attachment should not go; and the rule for the rest was in the mean time enlarged.

• [136]

Case 91.

The King against Athos, Father and Son.

An indictment for murder found at the grand sessions in Wales may be removed by *certiorari* into the next English county to that in which the fact was committed; and therefore a murder committed in Pembrokeshire may be tried in the county of Hereford; for by the statutes 26. Hen. 8. c. 4. the 26 Hen. 8. c. 6. and 34. & 35. Hen. 8. c. 26. the justices of assize in the next English county have a concurrent jurisdiction throughout all Wales with the grand session.—S. C. 1. Stra. 553. 3. Burr. 1330. 1. Com. Dig. "Action" (N.). 6. Com. Dig. "Wales" (B. 1).

THIS CAUSE began in Hilary Term, in the ninth year of George the First (a). THE ATTORNEY-GENERAL moved, in Easter Term last, for an *habeas corpora* directed to the gaoler of the common gaol in the county of (b) Pembrokeshire, to remove the bodies of Thomas * Athos the father and Thomas Athos the son from the gaol in Pembrokeshire to the keeper of the gaol in the county of Hereford, that being the next English county to Pembrokeshire, and likewise for a *certiorari* to be directed to the proper officer to remove the indictment found against them in Wales (c), and to the coroner of

(a) The first motion was in Hil. 9. Geo. The reason given was, in order that they may receive their trial in the county of Salop, the next English county, according to the statute of 26 Hen. 8. c. 6. f. 6. Lev. 118. Mod. Rep. 64. The county of Pembrokeshire was formerly one of the ancient Welsh counties.—Cur. By virtue of that

statute we may grant such *certiorari*; and we are also warranted by former precedents on Mr. Harcourt's search; as Rex v. David Davies, 3. Car. 1.

(b) There was no rule in com. Pembrokeshire in Easter Term, but only in com. Hereford.

(c) See Lev. 118. Mod. Rep. 147. Pembrokeshire

Pembrokeshire to remove the *inquisition* taken by him upon the view of the body of *George Martin*, who was murdered by the father and son in a barbarous manner, and for which an indictment was found against them in *Wales*.

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On motion to set aside the former rule it was said, that MR. ATTORNEY founded his motion upon the statute 26. Hen. 8. c. 6. § 6. by which it is enacted, “that Justices of peace and of gaol-delivery in the counties next adjoining to *Wales*, where the king’s writ runneth, may hear and determine all felonies, and their accessaries, committed in *Wales*, or the marchers thereof;” but this clause extends only to *Indisps marchers*, and not to any of the *ancient counties* in *Wales*. Besides, the aforesaid statute was altered about eight years after it was made; for by the statute 34. & 35. Hen. 8. c. 26. by which *Wales* is divided into twelve counties, and Judges appointed to keep their sessions in the said counties, it was enacted, “That those Judges might hold pleas of the crown in as large a manner as the Judges in *Westminster-Hall*, and that they shall enquire, hear, and determine, all criminal offences whatsoever committed within their severall limits, and administer common justice to all the king’s subjects there, according to the laws of *England*.” So that by this subsequent statute the defendants shall not be put to their trial elsewhere, but only where the fact is supposed to be committed, which in this case was in *Pembrokeshire*; if it should be otherwise, then all criminal cases which the Judges in *Wales* have power to hear and determine by the statute last-mentioned would be removed to *England*, where he who is poorest, either the prosecutor or the criminal, must suffer, for want of money to bring and support his witnesses in an *English* county. It might be for this reason that a criminal indicted in *Wales* ought to be tried there.

THE COURT took time to consider these statutes, and declared, that if it was in their power they would grant the motion made by MR. ATTORNEY, because it was very difficult to have justice done in *Wales* by a jury of *Welshmen*, for they are all related to one another, and therefore would rather * acquit a criminal than have the scandal that one of their name or relations should be hanged; and that to try a man in *Wales* for murder was like trying a man in *Scotland* for high treason, those being crimes not much regarded in those respective places.

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THE COURT, at another day, declared, that it would be better only to grant the *habeas corpora* without the *certiorari*; for if both should be granted it would delay the prosecution, because if the indictment and *inquisition* should be removed, they come both into court the next Term, and not before; and they must both be sent down by *mittimus* to the next assizes in *Hertford*, which would not be until *March* following; so that the defendants could not be tried before that assize.

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BUT THE COURT said, that if THE ATTORNEY-GENERAL would enter a *nolle prosequi* as to the indictment already found in *Pembrokeshire*, then the defendants might be indicted again for the same fact in *Herefordshire*, and tried at the summer assizes, which would be the best and the most speedy method.

Thereupon a *nolle prosequi* was entered, and a (a) *habeas corpora* granted, and the defendants were indicted and tried in the county of *Hereford*, and both found guilty of murder.

But because their Counsel insisted, that this was a *mis-trial*, the Judge who tried the defendants would not give sentence to execute them.

THE ATTORNEY-GENERAL thereupon moved, in the beginning of *Easter Term*, in the ninth year of *George the First*, for a *habeas corpora* to bring up their bodies to the Court, that they might receive sentence of death, and for a *certiorari* to remove the record, so that the Court might have all before them to give judgment.

All which was granted.

And accordingly about a fortnight afterwards both the father and the son were brought to THE BAR.

THEIR COUNSEL objected, that their trial in an *English county*, and by a jury of *Englishmen*, was a *mis-trial*; for if it were good, it must be by virtue of the statute 26. *Hen. 8. c. 6.* as aforesaid; but it could not be good by that statute, because it extended only to those counties which were *lordships marchers*, and not to any of the *antient counties* in *Wales*, of which *Pembrokeshire* was one, and there were seven more, (*viz.*) *Glamorgan, Caermarthen, Cardigan, Flint, Caernarvon, Anglesea, and Merioneth*. It is true, by that statute it is enacted, "That the Justices of gaol-delivery in the
" counties next adjoining to *Wales*, where the king's writ runneth,
" shall hear and determine felonies, and their accessaries, committed in *Wales*, or the marchers thereof; and that an acquittal of
" felony in any *lordship marcher shall not be a bar for any person
" indicted for the same within two years next after such offence
" committed;" so that it seems plain that this statute relates only to the *lordships marchers*, who claimed several privileges, as to acquit criminals upon payment of fines, &c. which was never claimed in any of the old counties.

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THE ATTORNEY-GENERAL, on the other side, insisted, that all *Wales* was comprehended by that statute 26. *Hen. 8. c. 6.* and it is so explained to be by the subsequent statute 34. & 35. *Hen. 8. c. 26.* by which *Wales* was divided into twelve counties, whereof eight were declared to be the ancient counties as before-mentioned, and four others were made by the statute 27. *Hen. 8. c. 26. viz. Radnor, Brecknock, Montgomery, and Denbigh.*

(a) *Quere*, Whether this *h. b. corp.* broke gaol to *Hereford* gaol, or whether removed them immediately from *Pem-* they were first brought up hither.

But

But at the desire of the prisoners, they had Counsel assigned to argue that point.

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Afterwards one of the said Counsel moved for a copy of the writ of *habeas corpora* by which the prisoners were removed from *Pembroke* to *Hereford*, and likewise for a copy of the *certiorari* by which the record was removed, if any such there was; and if not, then for a copy of the order by which they were brought to *Hereford*, be it what it would, so that they might have the whole proceedings before them.

. But this motion was not granted.

But the prisoners had a copy of their record.

THE CASE being appointed to be argued this Term,

KETTLEBY, Counsel for the prisoners, insisted, that their trial in *Hereford* for murder committed in *Pembrokeshire*, was against a fundamental principle of the common law, which appoints that all trials shall be *per pares*; and that by neighbours, upon a presumption that *vicinis acta vicini cognoscuntur*; so that this must be a *mis-trial* at common law. This is a cause of very great consequence to the principality of *Wales*, because if a fact committed there might be tried in an *English county*, then the richest man will always bring his cause to be tried there; and as it has been already observed, the poor man must suffer for want of money to carry all his evidence thither, either for his defence, or to prosecute another; and no persons are so well able to judge of the truth of what is sworn, as the neighbours of a witness to whom he is known, so that by this means a powerful and a rich man may procure such evidence as to have credit where they are not known, when the same persons might have no manner of credit by them who are their neighbours. * It must be admitted, that such a trial could not be at common law, neither is it allowed by that statute 26. *Hen. 8. c. 6.* as they would insinuate on the other side; and this may appear upon the reason of making that statute, which was as follows: In former ages, when the *Britons* were drove out of *England*, and retired amongst the mountains in *Wales*, they would frequently make incursions in a hostile manner into *England*, their native country; to prevent which, the kings of *England* gave large tracts of lands to some of their most powerful subjects on the borders, and these were called *lordships marchers*; and such lands which the kings kept on those frontiers, or which reverted to the crown by forfeiture, or otherwise, were called the king's *lordships marchers*. That afterwards these *lords marchers* pretending to some extravagant privileges, without any manner of right, therefore this statute was made to curb them, and it was calculated for that very purpose. This plainly appears by another statute made the very next year, the 27. *Hen. 8. c. 26.* by which *Wales* was incorporated, united and annexed to *England*, and "that all persons born in *Wales* should enjoy the same liberties as the

* [139]

6. Com. Dig.
"Wales" (A.).

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" *English*," and that " the laws and statutes of this realm, and " none other, should be had, used, and executed in *Wales*," and divers *lordships marchers* were by this last statute united to *English counties*, and others to *Welsh counties*, and the residue were divided into new and particular counties by themselves, and those were *Brecknock, Radnor, Montgomery, and Denbigh*; so that the eight old *Welsh counties* are not within that act, but only those four counties which were cut out of the *lordships marchers*. It is true, there have been several attempts made to bring trials from those old counties to the next *English counties*, but such attempts never yet prevailed; yet so far they have gone as to obtain *certioraris* to remove indictments taken in this very county of *Pembroke*, because those are declarations for the king, which he may remove where he pleases. Besides, the court of king's bench has been formerly of opinion, that they had power to remove indictments out of those counties, to see whether they were good, and that they might quash them if they were not; but that if they were good, then to remand them back by *mittimus* into the proper counties by virtue of those very statutes. But * the Judges were not resolved, that indictments thus removed could be tried in the next *English county*; yet after several arguments at bar, in the thirty-first year of *Queen Elizabeth*, whether a *certiorari* would lie to remove an indictment out of *Caernarvon*, or not, the Court would not determine it, and therefore that indictment was tried in the proper county. And wherever an indictment was removed, there is a *quære* how the Court must proceed upon it. In *Chelle's Case* (a), which happened in the ninth year of *Charles the First*, which was an indictment for murder found in *Anglesea*, and a *certiorari* granted to remove it, the Court declared that they were not yet resolved, that it could be tried in an *English county* (b); and VAUGHAN, Chief Justice, who was a native of *Wales*, and may for that reason be presumed to have studied the law relating to that country, was of opinion, that this statute 26. Hen. 8. c. 6. related only to the four counties taken out of *lordships marchers* (c). The words of that statute upon which this question arises are, " that " the offence shall be tried in the next *English county* adjoining " to the lordships marchers, or other part of *Wales* where it " was committed." Now it is to be considered, that *Wales* was originally a *kingdom* of itself, afterwards a *principality*, and subjected to *England* by king *Edward the First*, in the year 1282; and afterwards by the statute of *Rutland*, it was provided in what manner civil and criminal causes should be tried there; and there is a clause in the statute 27. Hen. 8. c. 29. by which *Wales* was incorporated to *England*, " that the said statute should not extend " to derogate from any other act before that time made for the " trial of murder or felony committed in any *lordship marcher*, or " in any county of *England* next adjacent thereunto," which is

(a) 1. Roll. Abr. 304. Cro. Car. 231.

(c) Vaugh. 413.

(b) See Rex v. Thomas, 1 Lev. 118.

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an evident proof that the statute 26. Hen. 8. c. 6. did not include all *Wales*. As to the clause, "that such offences shall be tried in the next *English county* adjoining to the lordships marchers, or other part of *Wales* where they were committed," there the word "such" is a relative; and it is in the enacting part of the statute, and therefore must refer to some antecedent, which must be to some crime mentioned in the preamble, and the words "other part of *Wales* where the offences were committed," must be intended other parts which were neither within the *lordships marchers*, or within the *old counties*. * It is the opinion of Lord Coke (a), that all statutes ought to be interpreted so as the innocent may not suffer; and that to construe an act by itself, is the best sort of construction, because it is *ex visceribus causæ*; but if this act should be construed as the prosecutors would have it, then it would take away all jurisdiction from *Wales*, and make the statute itself of no effect, for it would be absurd and inconsistent to exclude all *Wales* from a jurisdiction of trying offences by removing the indictments into *English counties*, when this very statute expressly gives a jurisdiction to part; for it provides, "that all felonies, and their accessories, committed in the county of *Merioneth*, shall be enquired, heard and determined in the counties of *Caernarvon* or *Anglesea*, before the justice of North *Wales*, or his deputy, and by an inquest of *Caernarvon* or *Anglesea*." Besides, by the aforeaid statute 27. Hen. 8. c. 26. of incorporating *Wales* with *England*, it is enacted, "that all persons born there shall enjoy all liberties as other subjects of *England* do enjoy;" and it is certainly a very valuable liberty and privilege for a man to be tried by his equals and neighbours, which privilege has been enjoyed by the *Welsh* ever since the making that statute, which is now above a hundred years; and during all that time there is no instance to be given of removing any trial from either of the old *Welsh counties* to be tried in an adjoining *English county*; and it would be very hard to make a precedent for that purpose after such a length of time.

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SECONDLY, It was objected against the record, viz. to the indictment on which the prisoners were tried, that the caption thereof was, that the grand jury (naming there) were *jurati et ovesati ad inquirendum pro crimine comitatus Hen. 8. c. 6.*, which must be of something arising within that county; but here the fact did not arise in that county, but in *Wales*.

THE COURT. This is the constant form in indictments for foreign treasons or felonies, and there is no difference, though in the last case the offence in the indictment is laid to be committed in that county where the enquiry is; for the statute of 26. Hen. 8. c. 6. s. 6. has declared that these offences "shall be enquired of in the same manner and form as if the same had been committed within the said shire."

(a) Co. Lit. 31. Hob. 310.

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IT WAS ARGUED *on the other side*, that though it was the fundamental rule of the common law, that trials should be had *per pares, et de vicineto*, yet that rule will be of no weight when the manner of trials is altered by act of parliament, as it was in this case, and that upon due consideration and for the advancement of justice. Now as to the statute upon which the present question arises, it is as full as words can express it, "that * the trial of a " fact committed in *Wales* may be in the next *English county*;" for by the plain and positive words of the act, all *Wales* is included. It is true, the *lordships marchers* are often repeated in the statute 26. Hen. 8. c. 6. and from thence it is inferred, that it was made to redress such abuses which were committed there. But it is plain that this is a remedial law, and made to redress all abuses, as well in every county in *Wales* as within the *lordships marchers*; and there are clauses in it which meet with every abuse, as well within the one as the other. It is true, the *lords marchers* did pretend to have several privileges and immunities which were never claimed by the rest of the people in *Wales*, and therefore this statute (which was made for the remedy thereof) was penned with particular clauses to meet with those mischiefs; as where they pretended to a privilege that none of the king's ministers should enter into their territories; and a privilege to pardon murders, and to acquit persons who had committed capital offences upon paying fines (*a*), and that such acquittal should be a bar to any subsequent trial for the same fact; and therefore it was provided by this statute, " that no acquittal in the *lordships marchers* should be a bar to a trial " in an *English county*, if it was prosecuted within two years after " such acquittal," which clause, though it is general in the statute, must be intended an acquittal by paying a fine only (*b*); for this, being a remedial law, was calculated to meet with all the grievances in *Wales*. The statute 27. Hen. 8. c. 5. which was made the very next year, complains of want of justice in *Wales*, which is a proof that the statute 26. Hen. 8. c. 6. intended likewise all *Wales*, for *indefinitum a quo pellet universale*; therefore this act intended all the *old counties* as well as the *lordships marchers*. And further, the statute 34. & 35. Hen. 8. c. 36. recites "all *Wales*;" and in the said recital there are these words, " though the statute " 26. Hen. 8. c. 6. was never put in execution in the counties " of *Arglesea, Merioneth, or Carnarvon*, it shall be used as law " in them as well as in *South Wales, &c.*" * Now *Pembrokeshire* is part of *South Wales*. It is true, no case comes up to the point now in question; but yet, for the reasons before mentioned, a trial in an *English county* for a fact committed in *Wales* is good. In that case of *The King v. Thomas* (*c*), the defendant pleaded *ceter fois acquit* when he should have demurred to the jurisdiction; and the extrajudicial opinion of VAUGHAN, Chief Justice, in that

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(*a*) See the case of *Rex v. Thomas*,
1 Sid. 179. 1. Lev. 118.

(*b*) So by the statute 34. & 35.
Hen. 8. c. 36.

(*c*) 1. Lev. 118.

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case, is the only opinion against a trial in an *English county*, but it does not appear what induced him to be of that opinion. This statute 26. *Hen. 8. c. 6.* appears plainly to be made to enlarge the king's jurisdiction, which was wanting in *Wales*, and for the advancement of justice; and therefore it ought to be construed so that all the clauses therein may stand together, and not that one should make the other void, but should be expounded by each other, for such a construction is *ex visceribus causæ*, as well as a construction of the enacting part by the preamble. Now in the enacting part of this statute, it is said, "that justices of gaol-delivery
" in the counties next adjoining to the *lordships marchers*, or other
" part of *Wales*, may hear and determine all felonies and their
" accessories committed in *Wales*, or the marchers thereof," which words "other part of *Wales*" can never be intended (as insisted on the other side) other part thereof which was neither within the *lordships marchers* or the *old counties*, because there is no part of *Wales* but what is within one of them. And such counties there were ever since *Wales* was united to *England*, as appears by the statute 12. *Edw. 1. c. .* called *statuta Walliæ*, where there are many good laws concerning the division of it into counties; and sheriffs were there, which shews that it must be then apportioned into counties. It was the express judgment of the parliament 34. & 35. *Hen. 8. c. 11.* that offences done in those old counties might be tried in the next adjoining *English county*, by virtue of the statute 26. *Hen. 8. c. 6.* aforesaid; for by that first statute it is appointed, "that offenders in *Merioneth* may be tried in *Salop*," and so might those of *Anglesea* or *Caernarvon*, though the act 26. *Hen. 8. c. 6.* was never yet put in execution there; yet by the aforesaid statute it was declared to be in force there, as well as in *South Wales*, which are general words. So that by the said statute 26. *Hen. 8. c. 6.* it was thought necessary to curb the insolence of the *lords marchers*, and to prevent an acquittal by paying a fine to be a bar to a prosecution * of a criminal in an *English county* for a fact committed in *Wales*, so as such prosecution was commenced within two years after the acquittal. VAUGHAN, Chief Justice, admits, that an *exigent* and a *capias utlagatum* went into the ancient *Welsh counties* ever since the reign of *Edward the First*, though not into the *lordships marchers*; and the reason was, because they had no sheriffs in the said *marchers*; and as to the inconveniency of removing causes into *English counties*, there is none, as pretended on the other side, because the prosecutor is never allowed to remove the cause without good cause shewed; but the king may remove his cause at pleasure.

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PRATT, Chief Justice, said, it seemed one of the clearest cases that ever was. And (*inter alia*) as to the case quoted from *Roll. Abr.* 394, 395. and *Gro. Car.* 331. the question there was only, Whether a *certiorari* would lie? We have granted one: and I think we are well enabled so to do; for *certioraris* will lie into *Wales*.

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THE COURT. All that can be said for the prisoners has been fully urged by their Counsel, but the Court is bound by express and plain words in this act of parliament, the preamble whereof complains of "great offences in *Wales*," which are general words, and comprehend all *Wales*; and in the enacting part it is declared, that the mischiefs were "all over *Wales*, but greater in the *lord-ships marchers*;" so that it is plain the parliament intended to give some remedy to the whole, that it might be adequate to the mischief, and meet it in as large a manner as possible. Now those general words in the enacting part, shall never be restrained by any words introducing that part; for it is no rule in the exposition of statutes to confine the general words of the enacting part to any particular words either introducing it, or to any such words even in the preamble itself. It is true, *Lord Coke* (a) commends a construction which agrees with the preamble, but not such as may confine the enacting part to it. And of the same opinion was *HOLT*, *Chief Justice*, in *Chambers's Case* (b), who was tried here for a murder committed in *Barcelona* in *Spain*, who said that trial was good by virtue of the statute 33. Hen. 8. c. 23. though the case was not within the mischief recited by that act.

Cro. Car. 438.
533.
Wil. Rep. 370.
See Atl. Rep.
175. 182.

EXRE, *Justice*. The same resolution was given about two years ago in the case of *Rex v. Elym* at the OLD BAILEY (c).

FORTESCUE, *Justice*. The like construction was made of the act of 13. & 14. Car. 2. c. 12. s. 21. *Rex v. Inhabitants of Rufford* (d). He said, that he was persuaded this jurisdiction would be sparingly executed, and never unless the justice of the cause required it; therefore it will not be a consequence, that no felon will be ever tried in the proper county in *Wales*. So that upon the whole it must be admitted, that a preamble may be a good expostor of a statute; but what was offered on the other side is not properly a preamble, but only introductory to the enacting part of the statute: besides, there was a time when there were no preambles to acts of parliament, and yet they were good; and even at this time preambles are no more than recitals of inconveniencies, which do not exclude any other to which a remedy is given by the enacting part. * It is true, there is an extrajudicial opinion of LORD VAUGHAN against such trials in an *English county*; but he being a native of *Wales*, might be prejudiced in favour of his country, and his notes were never revised or designed by him to be printed. As to the objection, that part of *Wales* is entrusted with trials of facts arising there, as that an offence in *Merioneth* shall be tried in *Anglesea*; and therefore it would be inconsistent to say, that the jurisdiction should be taken from the whole when it is expressly given to part; the answer is, that no jurisdiction is taken from *Wales*, because this statute gives the king only a concurrent jurisdiction to have the criminal tried in the next *English county* at

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(a) W. Jones, 164. Palm. 425.

(b)

(c)

(u) Ante, 35.

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his election : and the reason is plain, for the *Welshmen* had usurped privileges to which they had no manner of right ; therefore these statutes shew that they deserved correction ; and in the enacting part "all *Wales*" is included as well as "the *lordships marshes*:" so likewise where it is said, "that if jurors in *Wales*" (which words include the whole) "did not act according to evidence, they should be punished by the president and judges by fine, &c.;" which is such a severe check upon juries, that it would never have been enacted without some piece of injustice or partiality notoriously known and represented to the parliament in those days. It is admitted that there is no precedent in point for such trials in an *English county*; but the reason may be, because that statute 34. & 35. Hen. 8. c. 11. tells us, that "the laws were not put in execution."

And for these reasons, by the opinion of THE WHOLE COURT, it was adjudged that this was a good trial.

THE COURT thereupon ordered, that the prisoners should be brought up on another day to receive sentence ; and accordingly they being brought to the bar,

IT WAS MOVED *in arrest of judgment*, that the Court could not proceed to give sentence, but that they ought to be remanded into *Herefordshire*, to receive judgment at the assizes, because by this statute that power is given to the Judge of assize who tried the cause, and to him only.

But upon reading the statute, the words were, "that the prisoner should be tried and condemned," as if the fact had been "committed in the next *English county*;" and certainly this Court might pass sentence on a criminal convicted in an *English county*. See 5. Burr. 2797.

So that motion was over-ruled.

And thereupon sentence was given, and a rule of court was made to THE MARSHAL of the King's bench to execute the prisoners on * *Friday* the fifth day of *July*, who accordingly did * [146] execute them at the common (a) gallows in the county of *See Vent. 93.* *Surry* (b).

(a) *Quere*, If it was not at St. Thomas's à Waterings. See *Sura. 553.*

"prox. post octab. Trin. 9. Geo." (which was the second Saturday in that Term).

(b) This rule was made "die Sabbati,

The King against Burnaby.

Case 92.

UPON A MOTION for a *certiorari* to remove an indictment for a murder committed in *Anglesea*, upon an affidavit that the prosecutor feared some partiality in *Wales*, and therefore that it murder from *Wales*, on the prosecutor's affidavit, that he was informed by his solicitor that the defendant had made presents to the gentlemen of the county ; but on full and clear evidence of probable partiality the trial shall be had in the next *English county*.—*Ante*, 135. *Stia. 553.* 1. *Roll. Abr. 394.* *Cro. Jac. 484.* *Cro. Car. 248.* *Stia. 704.* 1. *Haic. 157.* *Ld. Ray. 581.* 2. *Burr. 835.* 4. *Burr. 2457.* *Cowp. 751. notis.* *Dougl. 751.* 2. *Hawk. P. C. ch. 27. l. 25.*

The Court will not grant a *certiorari* to remove an indictment of

might

Trinity Term, 9. Geo. 1. In B. R.

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might be tried in the next *English county*, for the defendant was bailed, and had made some valuable presents to the gentlemen of that county, as the prosecutor was informed by his solicitor;

A RULE was thereupon made for the defendant to shew cause why a *certiorari* should not go.

At another day it was shewed for cause, that if trials should be removed out of *Wales* into the next *English counties* upon such uncertain allegations, there could never be any trials there. And first, as to saying he was bailed, that could be no reason for the prosecutor to fear any partiality; for the defendant was bailable by law, because by the coroner's inquest, the fact was only found *chance-medley*: and as to the presents made to the gentlemen of the county, the affidavit was only, that he was told so by his solicitor, who probably might tell him what was false; therefore he ought to make a positive oath of that matter, otherwise a *certiorari* shall not be granted. Besides, in this case both the prisoner and the deceased were natives of *Holland*, and had no manner of interest in *Wales*; so that there is no colour to fear any partiality, but that justice will be equally distributed.

THE COURT. Where there is a just reason to induce the Court to believe that partiality will be shewed on either side, there the indictment shall be removed into an *English county*: but the truth of that matter will be suspected, where it is upon the motion of either the prisoner or prosecutor, and in such case there must be a full and clear affidavit to induce the Court to grant a *certiorari*; but where it is at the instance of THE ATTORNEY-GENERAL in behalf of the crown, it shall be granted without an affidavit; therefore this rule shall be set aside for want of a sufficient affidavit, but the prosecutor shall have leave to move it again upon a better,

* [147]

Case 93.

* Belt against Collins.

Writ of error
coram vobis re-
siden. is a good
superfedeas after
it is allowed.

A WRIT OF ERROR *coram vobis residen.* was brought on a judgment given in the court of king's bench.

The question was, Whether it was a *superfedeas* before it was allowed by the Court?

IT WAS ARGUED that it was not, because this writ is different from other writs of error, for it is only that the Judges shall review their own judgment; and being sued out of Term, it is no *superfedeas* without allowance by the Court in Term-time. Neither is any other writ of error a *superfedeas* before it is allowed, because it is taken out of one court to reverse the judgment of another; and he who takes it out may keep it in his pocket without giving notice; for which reason it would be very inconvenient if such a writ of error should be a *superfedeas*.

IT WAS SAID on the other side, that this is as good a *superfedeas* as if the writ of error had been sued out in Term-time, for the law
has

has not fixed any certain or determinate time for suing out writs of error to reverse the judgments of this court in the exchequer-chamber ; but such writs are always allowed by the secondary, as well out of Term as within ; and a motion was never yet made in this court to allow a writ of error.

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THE CHIEF JUSTICE and TWO OTHER JUDGES were of opinion, that it would be hard that the execution of a judgment in this court should be delayed by a writ of error allowed by a secondary ; for if that should be so, then any man may avoid the execution for a whole Vacation, at the expence of no more than one shilling (a). There is certainly some variance between a writ of error of a judgment *coram nobis residen.* and other writs of error ; for the one is directed to the Justices of this court, and therefore should be allowed by the Court, but the other is directed to the Chief Justice only.

EYRE, *Justice*, was of another opinion. He cited the case of *Louns v. Carter*, in Chief Justice HOLT's time (b), where a writ of error was adjudged a *superfedeas* before it was allowed. It is true, there is a difference between this case and other writs of error ; but the reason is plain ; for where writs of * error are * [148] brought in THE EXCHEQUER-CHAMBER, or in THE HOUSE OF PEERS, to reverse the judgments of this court, they are always directed to the Chief Justice alone, because he is to certify the record ; but where a writ of error *coram vobis residen.* is brought, there is no record certified. Besides, there never yet was a motion in a court of law to allow a writ of error, because it is a writ of right, and due to the subject *ex debito justitiæ*. But admitting this writ is no *superfedeas* before the allowance, yet it is a good *superfedeas* after it is allowed, as this was, by THE SECONDARY, and before notice ; and so it was adjudged in the case of *Smith v. Cave* (c), in which case an execution executed was set aside ; but the want of notice excused the contempt.

(a) Therefore, although the allowance of a writ of error is of itself a *superfedeas*, and the service of the allowance only to bring the party into contempt if he proceeds, *Jaques v. Nixon*, 1. Term Rep. 279. ; *Perry v. Campbell*, 3. Term Rep. 390. ; yet the Court will not set aside a defendant's execution for the costs of a nonsuit sued out after the allowance of a writ of error, because the writ of error can only be for delay, *Kempland v. Maccaulay*, 4. Term Rep. 436. ; nor will the Court set aside an execution for

costs on a judgment in nonsuit in any case merely because a writ of error was allowed, *Box v. Bennet*, 1. H. Bl. Rep. 432. ; nor an execution on any judgment, if it appear that the writ of error was brought merely for delay, *Mitchell v. Wheeler*, 2. H. Bl. Rep. 30.

(b)

(c) 3. Lev. 312. ; and see *Dawbigne v. Davy*, *Dyer*, 244. ; *Eyres v. Lenthal*, 1. Mod. 112. ; and *Poph.* 132. Vent. 207.

The King against The University of Cambridge. Case 94.

MANDAMUS to the vice-chancellor, masters, and scholars of Cambridge, to restore *Dr. Bentley* to the degrees to which he had been admitted by THE UNIVERSITY, and had been surreptitiously Time allowed to shew cause to a mandamus.

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tiously degraded (as was suggested), or that they should shew cause why he should not be restored.

THE COUNSEL for the University desired time to shew cause why a *mandamus* should not go, for that there were several old books and charters which were necessary to be inspected before they could shew cause.

And thereupon the time was enlarged for that purpose.

And upon another day

A *mandamus* lies to restore a member of a university to *Doctor's degrees*, from which he had been degraded by the University court for speaking contemptuous words of the *vice-chancellor*, and of the process of the court.

* [149]

S. C. 2. Ld.
Ray. 1334.
S. C. Spr. 557.
S. C. Fort. 202.
And 177.
3. Bac. Abr.
532.
2. Ld. Ray. 1564.
Esp. Dig. 677.
2. Term Rep.
358.

IT WAS ARGUED for the University, that by virtue of a charter given to them by *Queen Elizabeth*, they had a court of judicature to try and determine all matters arising within their jurisdiction, in which court a plaint was levied by *Dr. Middleton* against *Dr. Bentley*, and thereupon a summons was sent by the beadle to the *Doctor*, which he received, and spoke contemptuous words of the court, for which he was degraded, and from which no appeal would lie, no more than a writ of error would lie for imposing a fine by a temporal court for a contempt, because every court of record is entrusted with the final judgment of what shall be a contempt to their authority; therefore if an appeal or a writ of error would lie in such case, it would put the trial of what is a contempt to the discretion and judgment of a superior court, and so strip an inferior court of that power which they have by law to judge what is a contempt to them; whereas contempts of the authority of courts are undoubtedly to be judged by the same courts to whom the contempt is offered; which is the reason that a writ of error will not lie on a sentence for a contempt to this court; but then it must be plainly proved. Now the same thing is done by a *mandamus* after an indirect manner as would have been done by an appeal or writ of error, if that would lie; but as an appeal will not lie for a contempt, so neither will a *mandamus*; for admitting this degradation had been *ad libitum*, yet a temporal court could not grant a *mandamus*. It is like the case of a recorder of a corporation who was removeable at will, and being displaced moved for a *mandamus*, but it was denied. Besides, the constant course and custom of this University warrants a discretionary power amongst them to confer degrees on some, and to degrade others for any contempt; and in this case they have done all they could to bring *Dr. Bentley* to an easy agreement; for after the first summons they sent another in writing by their beadle, but the *Doctor's* doors were then shut, and he would not be seen; then they adjourned from day to day, on purpose to give him leave to appear, before they would suspend him; but when he contemptuously declined, they first suspended and afterwards degraded him. Now as a *mandamus* was never yet granted to admit a man to a degree in THE UNIVERSITY, after he had performed all his exercises, so there ought to be none to restore one after a degradation, because degrees are arbitrarily given by the universities, and so are degradations arbitrarily made; for if they should by any means rashly

rashly admit an unlearned man to a degree, they may upon better information degrade him, without taking a traverse to the return of a *mandamus*, which must be tried by a jury of lay freeholders. Besides, these degrees are but titles of honour and precedency, and give no temporal right, and for that reason a *mandamus* ought not to go; for if a *knight* should be degraded in a COURT OF HONOUR, no *mandamus* would lie to restore him (a), which is a case in point; therefore if it should lie in this case, it would introduce a new method to evade * the privileges given by this charter, which was afterwards confirmed by parliament; and as it hath been formerly adjudged in the case of *Castle v. Litchfield*? (b), that a *certiorari* or writ of error will not lie to correct a judgment given for a contempt, so no *mandamus* ought to go, which is in effect the same. If it should be objected, that his degree qualifies him for some temporal employment, of which he would be incapable without it; now admitting that to be true, yet such employments are only consequential, and not directly incident to his degree, and therefore ought not to be regarded. And if another objection should be made, viz. that *the Doctor* would have appeared by a proctor, but was not allowed so to do; though this may be true, yet it is no objection of weight, because it might not be the course of their court to admit such appearances, and THE UNIVERSITIES have a privilege to proceed according to their own laws, as an encouragement to learning; and if they have proceeded accordingly, this Court will not interpose. Now take the case as it stands upon *Dr. Bentley's* affidavit, there will be no reason to grant a *mandamus*; for he makes oath, that he has appealed from the sentence of the University court; which if true, then there is another remedy for him to be restored, viz. by an appeal; and where there is another remedy, a *mandamus* is never granted. Moreover *the Doctor* made oath, that the University had no power to degrade him; if so, then he is not degraded for want of a sufficient power so to do, and consequently a *mandamus* ought not to go, for it is impossible that a man should be restored to his degree who was never degraded.

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BUT ON THE OTHER SIDE *it was said*, that the merits of this cause ought not to be argued upon a motion, but upon the return of the *mandamus*; and for that reason it ought to be granted.

THE COURT. All care shall be taken that justice shall be duly administered in THE UNIVERSITIES; but if they assume an arbitrary power exempt from the jurisdiction of any other court of judicature, then they may do what they please without controul; and where people are under such a government, they are in a very bad condition. But this Court hath a greater regard to the learning of the Universities than to admit the arbitrary sentence of a vice-chancellor to be final. * As to what has been said, that the degrees in the Universities are only *honorary*; this is a mistake,

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(a) 1. Lev. 119.

(b) Hardres, 505.

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for they are blended with a temporal right so far as to deserve a *mandamus* to restore a man degraded. It is true, this might have been a proper objection before the statutes of 21. *Hen. 8* c. 13. and 13. & 14. *Car. 2.* c. 4. were made, which render a man incapable of a benefice if he had not taken his degrees in some university; for before those statutes, such degrees were only titles of precedence, and the allowing them, or a degradation, was no temporal advantage or loss; therefore in such case the temporal courts had no reason to interpose; and this may be the reason why the Universities degraded *ad libitum*, and of their constant course so to do. But this is no objection since the making those statutes. Neither shall it be said, that where a corporation has admitted a man willingly to his freedom, that they shall have power to disfranchise him, because they do not like him; neither can the Universities give degrees to whom they please, and take them away *ad libitum*. And though their Counsel have objected against this *mandamus*, for that they have an exempt and absolute jurisdiction amongst themselves, this seems to be a good reason why it should be granted, though it might have been otherwise if they had shewed that they had a visitor, to whom an appeal would lie; for probably that might have excluded the superintendency of this Court; but to deny a degree to him who had performed all his exercises to qualify him for a degree, would be a great discouragement to learning; and in such case this Court would grant a *mandamus* to admit him, especially since it is accompanied with a temporal interest. Now admitting it should be enacted by some statute, that a man should be incapable of such an office if he was not a knight, should not a knight degraded have a *mandamus*? Certainly he should; and so had *Dr. Bentley* in this case.

The return of the *mandamus*. The *mandamus* was granted, and the University made this return:

* [152] * That THE UNIVERSITY has been an ancient university *tempore*, &c. and also a corporation by the name of "chancellor, "masters, and scholars;" that they have had the care and education of the youth and scholars there; that they have had and used the right of conferring degrees on any persons whom they pleased, and the same persons *ab eisdem gradibus (propter contumaciam vel aliquam aliam justam vel rationabilem causam) suspendere vel deprivare*; that a court was granted by *Queen Elizabeth* to THE UNIVERSITY to be held before the vice-chancellor for the time being, or his deputy, and to have cognizance of all pleas, &c. except matters of freehold and felony; that the privileges of the University have been confirmed by act of parliament (a); that *Doctor Coniers Middleton* levied a plaint in the said court against *Doctor Bentley*, in a plea of debt, for four pounds six shillings (they both residing within the same university) *secundum consuetudinem curiæ*, and prayed process; *super quo*, at his petition, the

(a) 13. *Eliz.* c. 21.

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court awarded a process *ad compellend. prædict.* RICARDUM BENTLEY *ad apparend. coram* the vice-chancellor or his deputy *ad prox. cur.*; *quod quidem decretum*, the twenty-third of September 1718, *fuit deliberat.* EDUARDO CLARKE, beadle of the court; that the said *Edward Clarke accessit ad dictum* R. BENTLEY *et ostendit dictum decretum*; *et superinde* the said twenty-third of September the said R. Bentley having discourse with the said *Edward Clarke* concerning *Doct̃or Gooch*, being then vice-chancellor, said, that the decree was unlawful and unstatutable, *et quod noluit illud obedire*, that *Doct̃or Gooch non fuit ip̃sius iudex*, *et stultè egit*, *et alia verba contumeliosa propalavit*, *et dictum decretum de manibus* ED. CLARKE *abstulit*; that at the next court *Doct̃or Middleton* appeared and declared in debt for four pounds six shillings, *secund. consuetud.* at which court the said *Ed. Clarke* *quasdam depositiones exhibuit* to the register of the said contempt and disobedience of the said R. Bentley; that thereupon the vice-chancellor, with consent of seven doctors of the university, who were heads of colleges, declared, that the said R. Bentley *pro contemptu illo suspensus fuit ab omni gradu suscepto titulo et jure*, and he was accordingly suspended.—THE RETURN further shews, that there is a custom within the university to assemble the masters of the colleges in the university, which assembly is stiled A CONGREGATION, and have power (*super contumaciam vel aliam justam et rationabilem causam*) to deprive any person of their degrees, *et super purgationem restituere*; that accordingly a congregation was assembled seventeenth of October, when *Doct̃or Gooch narravit contemptum prædict. pro quo suspens. et deprivat. fuit*, *et petit quod dejiciatur et excludatur*, &c. *Et superinde visis præmissis et lectis depositionibus prædict.* the said congregation confirmed the decree of suspension, and further ordered, that the said R. Bentley *de omni gradu suscepto et titulo et jure penitus dejiciatur et excludatur. Et pro his causis*, &c.

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IT WAS OBJECTED *against this return* in general, that admitting the vice-chancellor, masters, and scholars, had a power of giving degrees, and of suspending and degrading for reasonable causes, yet that power must be under the inspection of this Court, unless they can shew some good cause to exclude it. Now by this return they do not pretend that any appeal did lie to a proper visitor, but have absolutely excluded all visitatorial inspection; so that by their own shewing they are subject to the jurisdiction of this Court, as all other corporations are. Besides, every man who is admitted to a degree in the university has a freehold for life, of which several statutes take notice; as, for instance, the statute 21. Hen. 8. c. 13. enacts, “that the several persons therein named, and who “are admitted to degrees in either of our universities, and not by “grace only, may purchase a dispensation to keep two benefices “with cure, &c. which benefices are for life.” So by the statute 17. Car. 2. c. 3. it is enacted, “that the incumbents of churches

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“ united must be graduates in one of our universities ;” which union is likewise for life, and no persons are capable of such benefices but graduates. Therefore this Court will take notice of such degrees as entitling the graduates to some temporal right ; and if so, * then the question will be on this return, Whether the sentence given in the vice-chancellor’s court is legal, or not ? It is admitted, that *the Doctor* was guilty of a contempt, for which they might have punished him if they had proceeded in a right method ; but it is certainly wrong to take away a man’s freehold by any other means than *per legem terræ*. Then as to the return itself, it appears that there were four causes to suspend *the Doctor*.—FIRST, In saying that the vice-chancellor acted rashly, for *stultè agit* implies rashly as well as foolishly, and in the return shall be taken *in mitiori sensu*.—SECONDLY, In saying that the vice-chancellor was not his judge.—THIRDLY, By taking the process from the beadle.—FOURTHLY, In saying that the process was illegal. But they do not return any custom of suspending or degrading ; though if they had it had been void, if it was unreasonable, as it was held in the case of the *City of London*, that an unreasonable custom, though confirmed by act of parliament, is void. Neither do they set forth what punishment is to be inflicted for a contempt, in case the offender had not been a graduate. Then they say, that the depositions for this contumacy were exhibited by the beadle, &c. Now by reason of this hasty judgment, those depositions ought to be very plain ; but it doth not appear that they were taken before a proper magistrate who had power to tender an oath, but only that they were taken *de contemptu prædicto*. Now the word “ deposition ” does not *ex vi termini* imply that it was taken on oath, for it is a relative word, and denotes no charge (a) ; and it does not appear but that it might be taken to clear him of a contempt ; and convictions are daily quashed for such faults, where they fix no crime on the convicted ; now if they had returned before whom the depositions were taken, it might have appeared to be before one who had no power to take them. Another part of the return was, that the power of conferring degrees is in the “ vice-chancellor, masters, and scholars,” and so is the power of suspending and degrading ; therefore of their own shewing the vice-chancellor’s court has no such power ; it is like a corporation which has power to remove a freeman, but if he is removed by a court of a corporation it is illegal. * By the law of *England*, a man cannot be twice punished for the same offence, but here *the Doctor* was twice punished for this contempt : first, he was suspended by the vice-chancellor’s court ; and afterwards, upon a grace proposed to a congregation of doctors and heads of houses by the said vice-chancellor, he, by the advice and consent of seven other doctors of the university, was degraded ; which is a double punishment ; for how can that congregation take notice of the suspension, it not coming before them either by writ of error or

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(a) Yel. 72. 111. 122. Latch. 39. 3. Inst. 167.

appeal ; so that it was an extrajudicial cause, and in a very extraordinary manner, and cannot be a confirmation of the first sentence, but a second punishment independent of the first, which was the suspension, and that also for the same crime, so that it is wrong and unjust. Besides, of their own shewing, that court and that congregation had only a jurisdiction over those who reside in the university ; and therefore *the Doctor* could not be suspended, unless he resided there, which for aught appears must be taken by intendment, for it is nowhere expressly alledged that he did reside there ; neither do they shew to whom the contempt was, unless it shall be intended to that court who sent the summons. It is likewise returned, that a process issued to summon *Dr. Bentley* to appear at the next court, but they do not shew the nature of this process, whether it was by arrest, distress, or summons, which ought to have been set forth ; neither do they shew where or when the next court was to be kept, or for what cause he should appear there ; neither is it alledged, that he had notice of either, or that he was in contempt ; for if these things had been set forth, *the Doctor* might have an opportunity to defend his freehold. How can a man be said to be contumacious to a court when he did not know when and where they assembled as a court ? Now as to that matter, it is a constant rule in all cases where a *mandamus* is granted, that the party should have notice of his charge ; but it does not appear by this return, that *the Doctor* was summoned to answer for a contempt ; so that he was sentenced without being heard, which is illegal, and against natural justice, as may appear by the cases in the (a) margin. But if all the causes returned were true, yet none of them are sufficient either to suspend or degrade *the Doctor*, because a suspension, by their own shewing, must be for some reasonable cause ; now they do not set forth, that a contempt to this court was a reasonable cause to suspend *the Doctor* : * it is true, they have alledged a power time out of mind to suspend and degrade ; now this must be by custom, for they do not pretend to any jurisdiction by the civil law. Now all customs in *England* are *prima facie* to be intended at common law, unless specially set forth to be otherwise, and they must have a reasonable commencement, otherwise they are not good ; but this custom is unreasonable and inconsistent with the common law, it being of a power to suspend and degrade at pleasure ; and it is not sufficient to shew that they had a jurisdiction of the cause, for that would destroy all manner of right ; because if it should be allowed, then every corporation might shew that they had a power to remove or disfranchise any member thereof, and give no account of the cause of such removal or disfranchisement ; but the constant

(a) 9. *Edw.* 4. 14. a. 39. *Hon.* 6. 32. 11. *Co.* 99. a. *Sid.* 14. pl. 7. 2. *Sid.* 97. *Style*, 446. 452. *Fortesc.* Rep. 206. 325. *Salk.* 181. pl. 1. 2. *Salk.* 434, 435. *Ld. Raym.* 225. 2. *Ld. Raym.* 1343. 1403. 1407. 4. *Mod.* 33. 37. 6. *Mod.* 41. *Ante*, 3. 101.

Post. 377. 12. *Mod.* 27. *Sira.* 567. 630. 678. *Sess. Cal.* 172. pl. 155. 219. pl. 179. 267. pl. 210. 295. pl. 212. 353. pl. 281. *Felt.* 416. *Cal. of Set. and Rem.* 373. 2. *Edward. K. B.* 241. 264. 282.

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practice in such cases is otherwise, therefore they ought to have set forth in this return, that the contempt was a reasonable cause of suspension. Upon the whole matter, where-ever a man loses any thing depending on a freehold, a *mandamus* will lie, if he has no other remedy; it was granted to a *Presbyterian parson*, and directed to a justice of peace, to admit him to take the oaths and subscribe the test, that he might be entitled by law to preach in his congregation: and therefore a peremptory *mandamus* was prayed.

IT WAS ARGUED for the *University*, and to maintain the return, that there was nothing in this case but what was usual in cases of this nature; for as in the courts of common law, if the defendant refuse to appear upon process of those courts issued out against him, then he is to be outlawed; and if it be out of the spiritual courts, then he is excommunicated; so in these courts of universities, a suspension or degradation is the only method to enforce an obedience to their authority; and though they proceed in a different manner from the course of the common law, yet, if it be warranted by any other law, or by the allowed usage amongst them, it is good. Now this method of proceeding is allowed in all the universities in *Europe*; and as they have a power to suspend, so likewise they have a power to restore the person suspended, upon his submission; and by the charter granted to this university by *Queen Elizabeth*, they have a particular power to determine all causes arising within their jurisdiction. It has been alledged on the other side, before this *mandamus* was granted, that degrees in the universities are only titles of honour, and given as the rewards

* [156] of learning* and merit. Now allowing this to be true, it is certainly a very strange inference to say, that the persons to whom such degrees are given cannot therefore lose them for a contempt, or any other demerit. Besides, these degrees are given by the university, under a tacit condition that the graduates shall conform themselves to the rules and usages there, and for that reason it is no novelty to proceed against them for disobedience to those rules, but warranted by the constant practice in all universities here and abroad. Now, to answer the objections made against this return: First, it was said, that it does not appear that there was any reasonable cause for this suspension, nor how the process issued. In answer to this objection it plainly appears, that there was a plaint levied in the court against *Dr. Bentley*, according to the custom of the university, and that according to such custom process issued against him, which must be a *citation*, because that is the first process in all ecclesiastical courts, or in cases where the proceedings are according to the course of the civil law, which is the law generally used in all universities. It is true, there were cases cited on the other side which prove, that the process must contain *the day* when, and *the place* where the court is to be held, and likewise *the cause of action*; all which were omitted in this process: the reason is, because this was a process according to the civil law, wherein such certainty is not required as if it had been a process at common law, by which the time and place of holding the court must be ascertained;

Dyer, 162.
1. Roll. 282.
2. Cro. 514. 572.
2. Bull. 32.
Cro. Car. 254.
Shower, 85. 95.

ascertained ; but where the time is uncertain, as it is in all inferior courts, *viz.* when they are to be held, there is no occasion of mentioning the day in the process, because the person summoned must take notice himself when the court is to be kept. As to the objection, that it does not appear that the depositions exhibited by the beadle to prove the contempt were taken by a proper magistrate, upon oath, who had power to administer such oath ; this might be a proper objection, if the proceedings had been likewise at common law ; but an oath in such cases is not required by the civil law, because by that law it is sufficient to say that it was done *ex relatione* of the officer to whom the contempt was offered ; "*depositio*" imports an oath. If not, why should an oath be necessary ? The Court is the proper judge what sort of evidence to proceed on : if their proceedings are different from proceedings in this court, that will be no reason for a peremptory *mandamus* ; by the ecclesiastical law, their courts may proceed in suits by a wife without her husband, and this court will not grant a prohibition. So the admiralty courts in *England* may execute a sentence in a foreign admiralty given in a case *not* in *England*, without being prohibited by the common law ; and it is what frequently happens, even in courts of common law, to order a man into custody for speaking * contemptuous words of such courts, upon an affidavit made that the party was summoned, &c. As to the objection, that the cause of action is not set forth in the return for which *the Doctor* was to appear ; one would think that he who made this objection had not read the return, because it plainly sets forth, that a plaint was levied by *Dr. Middleton* against the said *Dr. Bentley*, and process issued against him to appear, &c. and that *Dr. Middleton* declared for his debt, &c. And as to the objection, that there was not any contempt set forth, the contrary is certainly true ; for it is returned, that *the Doctor* took the process from THE BEADLE, which is a contempt ; and this appears by a statute of the other university of *Oxford*, which is, that if any person shall take the vice-chancellor's writ from the beadle, he shall be degraded, if a graduate ; and if not a graduate, then he shall be otherwise punished ; by which it appears, that university took it to be a contempt to have their process taken from a beadle. It is true, it does not appear by this return in express words, that it was taken from him by violence, or that it was not restored ; but the words *de manibus summatoris abstulit* imply a taking by violence and force. Besides, it appears by this return that *the Doctor* said he would not obey the summons, and that the vice-chancellor acted foolishly, and that he was not his judge, which being spoken to the beadle is certainly a contempt ; for if *the Doctor* had anything to shew why the vice-chancellor had no jurisdiction, he ought, as the law directs, to have appeared and shewed the cause, and not to tell it to the beadle, to bring their court and their proceedings into the contempt of the vulgar. It has been farther objected, that if the day and place of holding this court had been set forth, and notice likewise given to the

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Doctor to appear and answer a contempt, he might then have an opportunity of appearing and clearing himself from that charge ; but those things being omitted in the return, he could have no such opportunity. In the return it is plain, that he was summoned to appear at the next court, and that for not appearing he was suspended ; which is a full answer to that objection ; but the suspension had been good, though *the Doctor* had never been summoned. * It is true, it is against natural justice to punish a man without hearing him ; but it is a mistaken method of arguing to apply general rules to particular cases ; for it is sufficient if *the Doctor* had an opportunity to be heard, and that is not denied ; but it is plain that he would not be heard, for he spoke contemptuous words of that court where he should be heard ; and therefore since he despised their authority, there was no occasion for a second summons to answer the contempt ; for the rule is, *contra veram contumaciam non amplius est advocandus*. Now where the civil law is the rule and guide of the Court, and they proceed according to that law, the courts in *Westminster-Hall* always give credit to such proceedings, otherwise it might be of very bad consequence to have an inferior court proceed by one law, and to have the sentence of such court reversed by a superior court, where the proceedings are by another method, and by another law. The sentence given against *the Doctor* is not so very severe as it has been represented, because upon his submission, or clearing himself of the contempt, he might be restored to his degrees at any time ; and this degradation, which is only a means to enforce his obedience, would be quashed ; so that it is his own fault and obstinacy if he is not restored. It has been said on the other side, that a disfranchisement of a freeman for a contempt to the mayor's court was never yet seen, which is very true ; but these cases are far different from degradations, because where a member of a corporation is disfranchised, he is secluded from all privileges of that corporation, and the rest of the corporate body are deprived of their interest in him, and of his voting in any corporate act ; but it is otherwise in the case of a degradation, because the person degraded is still a member of the university (for so is *the Doctor* in this case) who is still head of a college. It is true, this degradation is a personal reflection on him, and he is thereby deprived of some benefit arising from his degrees in this university, but he is still a member thereof. All that was done as to his degradation was *secundum leges et consuetudines universitatis*, who have a power finally to determine in such cases ; yet that does not exclude other powers to inspect their actions ; but if they proceed according to their known laws and customs, though a little different * from the common law, this Court will give credit to their proceedings, and not interpose. Now in this case they proceeded according to the laws and customs of the university ; for the vice-chancellor's court has cognizance of all personal actions arising there, and where any of the members thereof are concerned (excepting felonies), and this

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this is an independent jurisdiction, exclusive of all others, time out of mind, and confirmed by act of parliament, any law, custom, statute, or constitution, notwithstanding; and this is purely to give them leave to proceed according to the civil law. It is true, HALE, in his *History of the Common Law*, tells us, that the king cannot give power by his charter to set up any jurisdiction to proceed by any other means than the common law; which shews, that though he cannot do it by charter, yet it may be done by act of parliament, as it was done in this case, on purpose that they might proceed by the civil law; therefore this Court will not interpose to examine their proceedings, whether they are right or not, because that court proceeds by a different law, viz. by the civil law, and they have returned, that *the Doctor* was suspended according to the customs of the university; so that this suspension must be according to civil law. As to the objection, that no particular custom is returned for the vice-chancellor's court either to suspend or degrade, and that those were punishments not adequate to the crime, which was only a contempt; the answer is, that it plainly appears to be otherwise by the civil law, which is to be the measure of the punishment in this case. It has been likewise objected, that those degrees confer a temporal right on those to whom they are granted. It is true, those degrees are granted by virtue of a power given by the crown, as all other honours and precedencies are; and the granting them is but the disposition or order of the precedency included in that liberty given by the crown in founding a college, like a corporation, which likewise is founded by virtue of the king's grant. Now all collateral qualities tacked by the parliament to those degrees do not alter the power of the universities to dispose them as matters of precedency, nor alter the nature of those very degrees; as if an act of parliament should be made, that no person should be capable of such benefices but those who were bred at one of the schools at *Eaton* or * *Westminster*, * [160] would such a statute make any alteration in the discipline of those schools, but that still they might give precedency to one scholar before another, without the interposition of this court? and the university itself is but one great school, viz. *schola illustris*. The case of holy orders is still of a higher nature, and in consequence thereof has a greater temporal right; yet that right may be taken away by a sentence in another court, and not subject to the control of this or any other temporal court; as, for instance, the *Bishop of St. David's* (a) was degraded in the spiritual court for simony, and in consequence of such degradation lost his barony; but this Court would not interpose. So likewise where any person is excommunicated, or where a chancellor grants a sequestration to enforce an obedience to the ecclesiastical law, no *prohibitions* or *certioraris* will lie. So a *feme covert* may sue in the spiritual court without her husband; and this being allowed by their law, this Court will not interpose. So justices of peace have power, by

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Rol. Abr. 530.
553.
Sid. 71.
T. Raym. 3.
Lev. 267.
4 Mod. 160.
Vent. 32.

several statutes, *finaliter determinare*, and that in a summary way and method different from the common law; and this Court will give credit to their proceedings, if they act accordingly. Now this suspension is no more than an amotion by virtue of a clause in their charter; so that if the cause was within their jurisdiction, a *mandamus* cannot be granted for any irregularity, for that is altogether out of the case, because this Court is not to enquire thereof, where the cause is within the jurisdiction of the civil law; and therefore in the twelfth year of *William the Third*, this Court would not interpose in *Dr. Groenvelt's Case*, who was fined and imprisoned by the College of Physicians, they having power by a statute so to do. If a man be excommunicated who was never cited, this Court will not grant a prohibition. The proper remedy is by appeal, it being an error in their proceeding, for an appeal lies *de nullitatibus*. So if an act of parliament giving justices of peace power to convict, enact that no *certiorari* shall be brought, the person convicted has no remedy but by action on the case, if the conviction be malicious. This charter, which created the vice-chancellor, having exclusive clauses, the Court ought not to question the regularity of their proceedings; but an appeal may be brought in the Senate. It has been objected, that this suspension is no more than an amotion by a corporation in common cases, so it could not be done by the vice-chancellor's court, no more than a man can be removed by a court of a corporation. But this objection is wrong; for where the body of the university are judges, as in this case, there the vice-chancellor is only their *locum tenens* in order to execute justice; * and the University is active in him who hath a delegated power to hold courts before the whole body, and a part is implied to be acted by the whole corporate body by their law, as the *graviores causas*, such as granting degrees or depriving; and it is set forth, that their court has power to suspend or deprive, and to restore upon submission; but when *the Doctor* has contemned that court, they may certainly suspend him without a second summons, especially since the contempt was to that court by which he was suspended. It was objected, that he has no remedy but by a *mandamus*; for though he might be willing to submit, yet the vice-chancellor might never call a court, and it is wholly in his power not to call one. Now as to that matter, there is a constant call of two such courts every year. Besides, it is in his power, upon extraordinary cases, to call a convocation at any other time; and this appears in the very return: but if it had not been set forth, it is implied by the course of the civil law; for by that law, all punishments for contumacy are, from the nature of them, temporary, though imposed in general terms; so that this university has proceeded as usual, and as all other universities in *Christendom*: and it is necessary in such cases to use some extraordinary jurisdiction, where young persons meet together from all places in the most unruly part of their lives; otherwise it would be of very ill consequence if the governors could not enforce an obedience without being subject to the

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the controI of this Court. Upon the whole matter, *the Doctor* knows that he is degraded, and for what cause, and he ought to have made his submission before he moved for a *mandamus*; and if that had been done, he might have no occasion to apply himself to this Court.

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PRATT, *Chief Justice*. This is a case of great consequence, both as to the property, the honour, and the learning, of this university, and concerns every graduate there, though at present it is the case only of one learned man, and the head of a college. The question is, Whether the University can suspend and degrade, and by what rules they may proceed in either or both of these cases? As to this matter, it is allowed they may suspend or degrade for a reasonable cause; but then the cause must be specially set forth, that the Court may judge whether it is reasonable, and according to law. And upon this ground it is, that a return of a suspension for contumacy generally will not be good, for the particulars of the contumacy ought to be specified. 5. Rep. 57.

* It is agreeable to law, that a man shall not be deprived of his property without being heard, unless it be by his own default; but it is hard that it should be in the power of one man to suspend or degrade another without any appeal; for if he should err, as all men are subject to error, then the person suspended or degraded has no remedy. It is allowed, that this University has a jurisdiction in several cases; and this Court will support them in the exercise of such jurisdiction, if they do not exceed their proper bounds and limits. Now as to the return, there are several causes set forth both for the suspension and degradation, *viz.* in saying, "that he would not obey the summons; that it was illegal; that the vice-chancellor *fiulte egit*; and that he was not his judge;" and all this spoken to a beadle who served the process of their court, and in a very indecent manner, in diminution of the authority thereof, and to make it ridiculous, which is consequently a contempt thereof; and if the like had been done to an officer of this court, it would have been accounted a great indignity, and the person should be punished; but then the matter must be brought before the Court in a proper manner: and whether that was done in this case is now to be determined. Now by this return it appears, that depositions for a contempt were exhibited by the beadle, but it does not shew that those depositions were taken before a proper judge; and this being the foundation of the degradation, it does not appear to this Court that they had any power to degrade *the Doctor*. But admitting they had such a power, then the next thing to be considered on this return is, whether the cause returned is sufficient to justify this degradation: and if it was, then whether it was well returned. * They return, that they had power to degrade for a contempt, and this was given to them by a charter of *Queen Elizabeth*, and for any other reasonable cause: now the cause returned was neither, for it was not a contempt to the University, but to the vice-chancellor's court; it is like a contempt to a mayor, which can never be said to be a contempt

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contempt to the whole corporation; therefore, though they might degrade for a contempt to the University, it cannot be inferred from thence, that they may degrade for a contempt to a private court of that university.

FORTESCUE, *Justice*. The words are "a contempt to the court," for which he ought to have been committed if he had been present in court; and if not, he ought to have been bound to his good behaviour. I do not see how a deprivation for this cause is agreeable to reason or justice: many customs of the University have been adjudged void. It is a rule, that all customs shall be certain. Now this custom to deprive *pro contumaciâ* is uncertain as to the meaning of the word "contumacy," whether it means contumacy to the congregation, to the vice chancellor, to this court, or to the University; whether to *Dr. Gooch* as head of the college, or as judge of the inferior court.

PRATT, *Chief Justice* (as to this matter). The words are improper and indecent: we should punish all persons who should speak so disrespectfully of our process, and might bind them to their good behaviour; but the authorities seem too strong to allow a power to remove a person from his freehold for such words.

EYRE, *Justice*, said, that he was not satisfied that the University can deprive for a contempt to the vice-chancellor; for a contempt to the vice-chancellor is no contempt to the University; they cannot deprive for all contumacies, nor have they returned a power to deprive for a contumacy to the vice-chancellor. It must be intended, being general "*propter contumaciam*," to extend only to contempts to the University. Suppose, in any other corporation a member should offer a contempt to an inferior court, can the corporation deprive him? No: they can only punish him as other inhabitants. A proper punishment for a contempt is fine and imprisonment, but not loss of freehold; an officer of this court ought not to lose his office for contemptuous words to the Court. A tenant to the lord of a manor or district cannot lose his estate for non attendance at any court.

FORTESCUE, *Justice*. Though a degree in the University is only a civil honour, yet interest and property being the consequence of such degree, the Court considers it as such with all its attendances. It is like the case of an alderman, which of itself is no profit, only by consequence. All degrees were originally given by the crown; and though the present right of conferring them is prescribed for by the University, yet that prescription must be presumed to be founded upon a right derived by authority from the crown; so that a person advanced to the degree of a Doctor, &c. may be esteemed to be advanced by the king. There were no degrees among the *Grecians* or *Romans*, nor among the first Christians; they began about the twelfth or thirteenth century, and have been since attended with great privileges and profits. *Universitatis* is the proper *Latin* word for Corporation. A learned
man

man of this university told me, that there were no degrees ever granted there until the university was a corporation. The seminaries for education of youth were antiently held in the cathedrals of the churches of the first christians. Besides, where any person is degraded for a contumacy, it ought to be by that court to whom the contempt was offered; but it is not pretended by this return, that the vice-chancellor's court had any power to degrade. Neither does it appear that *Dr. Bentley* was ever summoned to answer this contempt; and it is against natural justice to deprive a man of his right before he is heard; therefore if there was a custom so to do, such custom would be absolutely void; and it is a thing of daily experience to grant prohibitions to spiritual courts, if they deny the defendants a copy of the libel, because such denial is against natural justice. And now to offer a common instance, viz. Suppose an officer of this court should shew any contempt thereof, could he be deprived of his office for such contempt? Certainly he could not. It is true, they who have argued for the University insisted, that the proceedings there are according to the civil law, and this they have done to justify the suspension, without being summoned to answer the contempt; but it does not appear upon the return (upon which this Court is * to judge), that they proceed there by the civil law; and if so, then the Court must intend that they proceed by the common law, which they have not done, for there is no manner of proof that *the Doctor* was summoned to appear to answer the contempt; and it can never be said, that a court which proceeds according to the common law, shall suspend or degrade a person without being heard or summoned. It is said likewise, that this was not a proceeding by virtue of a charter alone, but by a charter confirmed by act of parliament. Now admitting that to be true, it must be granted that convictions, even upon acts of parliament, are frequently quashed, for not summoning the persons convicted, though not required by the statute, because it is still against natural justice to convict without hearing. The want of a summons is an objection that can never be got over. Had the custom been returned to deprive without summons, it had been void, as against natural justice. If a justice of peace convict any man without a summons, such conviction is void. I heard a learned civilian say, that God himself would not condemn *Adam* for his transgression until he had called him to know what he could say in his defence. - *Gen. iii. 9.* Such proceeding is agreeable to justice. Admitting the University has a jurisdiction, yet this Court will inquire what they have done, and how they have used that jurisdiction, as it was done in * *Bussell's Case*, where it was insisted, that the merits of the cause could not be inquired into upon the return of a *habeas corpus*, but it was over-ruled; and this Court cannot affirm the proceedings in this case without

Esp. Dig. 631.

* [164]

Stra. 567.
Sess Caf. 219.
pl. 179.

* Vaugh. Rep.

(a) By which law, For rescue, *Justi-* preserved than by any law in the whole
fic, said, property was infinitely more world.

Trinity Term, 9. Geo. 1. In B. R.

THE KING *over-ruling* *Bushe's Case*, and several other authorities of the like
against
THE
UNIVERSITY For which reasons **THE COURT** was unanimous in granting a
OF peremptory *mandamus*; and in *Easter Term*, in the tenth year of
CAMBRIDGE. *George the First*, the *Doctor* was restored to his degree.

Cafe 95.

Anonymous.

In what case homicide in the prosecution of an illegal act shall be murder.

Cases in Cro.
Law, 6. 106.

AT THE SESSIONS in THE OLD BAILEY held there on the ninth day of *April*, in the ninth year of *George the First*, where some of the Judges of the common pleas were present, this case happened:

Two men were beating another man in the street, in the night-time. A stranger passing by at the same time, said, "I am ashamed to see two men beat one." Thereupon one of those who was beating the other, ran to the stranger in a furious manner, and with a knife which he held in his right hand, gave him a deep wound, of which he died soon after.

And now both the other were indicted as principals for the said murder.

But **THE JUDGES** were of opinion, that because it did not appear that one of them intended any injury to the person killed, he could not be guilty of his death, either as principal or accessary. It is * true, they were both doing an unlawful act, but the death of the party did not ensue upon that act.

* [165]

So he was acquitted and the other was found guilty; and this agrees with the case of *The King v. Thompson (a)*.

(a) Kely. 66.

Cafe 96.

Anonymous.

The goods of another stolen out of a shop is not felony within the statute 10. & 11. Will. 3. cap. 23.

Cases in Cro.
Law, 18. 43.
325. 248.

AT THE SAME SESSIONS another man was indicted on the statute 10. & 11. Will. 3. c. 23. for stealing a shirt out of a shop. The statute enacts, "that any person who by night or day shall, in any shop, warehouse, coach-house, or stable, privately and feloniously steal any goods of the value of five shillings or more, though such shop, &c. be not broke open, and though the owner, or any other person, be, or be not in such shop, or that shall assist in committing such offence, being thereof convicted, shall not have the benefit of the clergy."

THE CASE was thus: A shirt which was the property of *T. S.* was left in the shop of *W. R.* to be sent to a sempstress to mend it, and was stolen by the prisoner out of the said shop.

The question was, Whether this was felony within the statute, for which the offender could not have the benefit of clergy?

THE

Trinity Term, 9. Geo. 1. In B. R.

THE JUDGES were of opinion, that it ~~was~~ not; for the statute ANONYMOUS. was made as a remedy for the owners of shops to preserve their own goods, which might be left there by way of trade, but did not extend to goods casually lost there, and consequently the stealing such goods to the value of five shillings was not felony without benefit of clergy.

And THE JURY gave a verdict accordingly.

The King *against* Powell and Others.

Case 97.

A RULE was made on the defendant *Powell* and one *Jones* to shew cause why AN INFORMATION, in nature of a *quo warranto*, should not go against them to shew by what authority they claimed to be capital burgesses of the borough of *Brecknock*, &c. and the like rule on *Mr. Price*, to shew by what authority he claimed to be RECORDER of that borough.

Formerly fifteen years possession of a corporate office would not prevent an information *quo warranto* to try the *merc right*.

IT WAS OBJECTED against the capital burgesses, that they were never duly chosen burgesses, and by consequence could not be capital burgesses.

S. C. post. 201. 291.
S. C. 2. Stra. 782.
S. C. 3. Bro.
P. C. 428.

Now, admitting that matter to be true, yet *Powell* being a burgess *de facto* ever since the year 1708, and *Jones* being * another such burgess ever since the year 1712, it would be of fatal consequence to this borough, after so long an acquiescence, to make all the corporate acts done by them during all that time void. And probably these men may be pursued a little farther; for the next step may be, whether they were ever admitted to their freedom; or whether they served seven years apprenticeship, which things may be very hard to prove upon a *quo warranto*. As to the recorder, he was elected the twenty-ninth of April 1722; but finding that election was not good, he was re-elected the twentieth of May following, and before he was sworn into the office; so that there is no colour to extend this rule to him.

* [166]

E contra. The long acquiescence, as suggested on the other side, can be no colour against this rule, which was made on the mere right; and it seems a little surprising that it should be offered against the rule, because length of time will never establish a right which was gained by usurpation. Now it is plain, that these men could never be *capital* if they never were *legal burgesses* (a). It is true, in cases of not taking the sacrament, or the oaths of allegiance and supremacy, the Court will intend that they were duly taken after a long acquiescence (b); but a right shall never be intended when the merits of it are controverted (as it is in this case), and no collateral part disputed.

(a) See ante, 134.

(b) See *Rex v. Williams*, 1. Stra. 677.

Rex v. Newling, 3. Term Rep. 310.

Rex v. Smith, 3. Term Rep. 573.

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against
POWELL
AND OTHERS.

And THE COURT being of that opinion, the rule was made absolute as to the *capital burgesſes* (a), but diſcharged as to the *recorder*, becauſe he did not rely on his firſt, but on his laſt election.

(.) The rule of the Court was never to allow an information *quo warranto*, after a corporator had been *twenty years* in poſſeſſion of his corporate franchise, 1. Burr. 433 4. Burr. 1962. Cowp. 58. 75. 2. Term Rep. 797. But this being thought too long a period, Rex v. Stacey, 1. Term Rep. 4. and as many informations of this kind had been granted previous to the making of the rule, though conſiderably within twenty years, 3. Term Rep. 311. the Court reſolved to limit their own diſcretion, in granting applications of this nature, to fix years,

4. Term Rep. 284. And now by 32. Geo. 3. c. 58. it is enacted, “ that to any information *quo warranto* the defendant may plead *in bar*, that he has held the office or franchise for *ſix years* preceding the information; and that no title derived under any election ſhall be impeached, by reaſon of any defect of title of the perſon or perſons electing, if ſuch perſon or perſons were in poſſeſſion *de facto* of his or their franchise or office ſix years before the filing of the information.”

Caſe 98.

Lilly againſt Hodges.

If A. and B. covenant for themſelves and for each of them with C. and D. that they will receive certain rents, and that they and each of them will pay a moiety thereof to each of them, the ſaid A. and B. an action of covenant by A. againſt C. aſſigning a breach that C. and D. had received ſo much and had not paid him the moiety thereof, is good.

THE DEFENDANT and one *Griffith* covenanted for themſelves and for each of them, and for their executors and adminiſtrators, and for each of their executors and adminiſtrators, with *Lilly* and *Cardonel*, to receive the rents due to the plaintiff *Lilly* and one *Cardonel* in *Ireland*, and likewiſe that they and each of them would pay a moiety thereof to each of them, the plaintiff and *Cardonel*.

AN ACTION OF COVENANT was brought againſt the defendant *Hodges* alone by the plaintiff *Lilly*, for his moiety; and the breach aſſigned was againſt both the covenantors, “ that the defendant *Hodges* and *J. Griffith* received ſeven thouſand pounds, and “ that the defendant did not pay the moiety to the plaintiff, nor “ account to him for the rents, &c.” * and upon the general iſſue pleaded, the plaintiff had a verdict.

IT WAS NOW MOVED *in arreſt of judgment*, that this action is not maintainable in this manner: it muſt be either an action againſt the defendant alone, charging him for his own act, or againſt both the defendant and *Griffith*, charging them on their joint act. This action is neither ſeparate nor joint, but both confounded together; for the receipt of the money is laid to be by both.— Beſides, the breach is aſſigned againſt both the covenantors; which is ill, becauſe the action is brought againſt one, and by one of the covenantees, when it ought to have been brought by both upon the joint covenant.

THE COURT. Two perſons may engage for the acts of both, as well as for the acts of one, and each may covenant for the other as well as for himſelf; but that which is fatal in this action is, that the covenant was made to two, ſo they both ought to join, for otherwiſe one may recover, and ſo may the other, ſo that the covenantor would be doubly charged.

* [167]
S.C. 1. Stra. 553.
5. Co. 19.
Noy, 86.
Salk. 137.
Cro. Eliz. 50.
Eſp. Dig. 288.
2. Burr. 1190.
5. Com. Dig.
“ Pleader”
(2. V. 2.).

THE COURT, however, were all of opinion, that the plaintiff should take his judgment, because the defendant had covenanted for the acts of his companion as well as for his own acts; and the breach and non performance of the covenant being laid jointly against both the covenantors, it is well enough.

LILLY
against
HODGERS.

THE MOST MATERIAL OBJECTION was, that both the covenantees ought to have joined in bringing this action, and that it should not be brought by one of them alone.

BUT IT WAS ADJUDGED, that the action is severed by the subsequent covenant, by which the defendant and the said Griffiths covenanted each of them to pay a several moiety of the rents; for though the covenant was joint in the beginning of the deed, viz. they both covenanted to receive the rents, yet it was severed by the apparent intention of the parties by that subsequent clause of paying the moieties to each of the covenantees; and if that had been omitted in this deed, then the action must have been joint against both, but now it is severed, and well brought against one by one.

* Hinton against Parker.

* [168]
Case 99.

PROHIBITION. The case was this: The widow of the testator exhibited AN INVENTORY of his goods in the prerogative court (a). Complaint was thereupon made by a legatee, that several goods of which the testator died possessed, naming them, were left out of this inventory, and an account was demanded to be given what became of those goods.

An inventory may be falsified at the suit of a legatee, but not of a creditor.

Swinb. 228.
Totill, 183.
12. Mod. 346.
1. Vezey, 75.
2. Vezey, 193.

The defendant pleaded, that the said goods were disposed by the testator in his life-time, and by his leave; and on this plea the spiritual court gave costs, for that it was a confession of more assets than were in the inventory.

Whereupon the defendant now moved for a prohibition, on a suggestion, that the Court proceeded to falsify AN INVENTORY which they had not power to do, because by exhibiting thereof their jurisdiction was determined.

THE COURT was of opinion, that the spiritual court could not falsify AN INVENTORY at the suit of a creditor (b); but at the suit of a legatee they might (c).

(a) See 21. Hen. 8. c. 5.

(b) See Catchside v. Ovington, 2. Burr. 1922.

(c) By the civil law, if the creditors or legatees, or any other person concerned, should discover any thing omitted,

or should mistrust it, they will be admitted to prove the omissions and frauds which they shall allege Dom. 596. tit. 2. sect 4. edit. 1737.—NOTE to the former edition. See also 4. Burn's Ecc. Law, "Wills."

Case 100. The Parish of St.^t Olave against The Parish of All-hallows on the Wall.

IF an apprentice serve two years in one parish, and is turned over by verbal agreement to a master in another parish, and there serve out his time, he is settled under the indentures, in the last parish. **ONE Underwood** was bound apprentice to a farrier in the parish of *St. Olave*, and having served two years of his time in that parish, was, by a verbal agreement between his master and one *Thomas Dennis*, sent to serve the said *Dennis* in the parish of *All-hallows on the Wall* in *London*, and there he served him five years; and afterwards coming back into the parish of *St. Olave*, and being likely to be chargeable, he was removed by an order of two justices to the parish of *All-hallows*, which order was confirmed upon an appeal to the next sessions; and both the orders were removed by *certiorari* into the court of king's bench.

* [169]

S. C. 1. Stra. 554.
S. C. Sett. and Rem. 114.

S. C. 1. Seff. Cases, 275.

2. Stra. 1001.

2. Seff. Caf. 176. pl. 138.

Fol. 267.

Fortesc. Rep. 308.

Caf. of Set. and

Rem. 16. pl. 23.

Ld. Raym. 683.

IT WAS OBJECTED, that both of them should be quashed, because the apprentice was not turned over by writing to the master who dwelt in *All-hallows*; and if so, then he could not gain a settlement * there upon account of his apprenticeship, because it cannot be said, that he served in that parish as an apprentice.

THE COURT. This very point was determined in *Michaelmas Term*, in the third year of *George the First*, in the case of the parish of *St. Leonard Shoreditch v. Trinity Parish (a)*; and it was thus: An apprentice bound to a master living in one parish, and serving some part of his apprenticeship there, was, by a verbal agreement made between his master and another, to serve out his time with that other master in another parish; and this was adjudged a good settlement in that other parish where he last served; for it shall be still intended, that he served his first master upon that agreement, and that it was but a continuance of his apprenticeship.

And so it was adjudged in the principal case (*b*).

(a) Stra. 10. 1. Seff. Cases, 112.
S. C. 2. Bott P. L. 578.

(b) *St. John Baptist v. St. James*, 2. Bott P. L. 563. *Stoke Fleming v. Bury Pomeroy*, 2. Bott P. L. 564. *Rex v. St. George's Hanover-Square*, Burr. S. C. 12. *Rex v. East Budgford*, Burr. S. C. 133. *St. Peter's v. Stoke Fleming*, Burr. S. C. 250. 1. Will. 96. *Rex v. Clapham*, Burr. S. C. 266. *Rex v. Farnington*, Burr. S. C. 416. *Rex v. St. Luke's*, Burr. S. C. 542. *Rex v. Tavistock*, Burr.

S. C. 578. *Rex v. Charles*, 2. Bott P. L. 588. *Rex v. Idelford*, Burr. S. C. 821. *Rex v. Stockland*, Dougl. 70. *Rex v. Langham*, Cald. 126. *Rex v. Bradnicle*, 2. Bott P. L. 594. *Rex v. St. Mary Lambeth*, 2. Bott P. L. 595. *Rex v. Sandford*, 1. Term Rep. 281. *Rex v. Bradstone*, 2. Bott P. L. 599. *Rex v. Holy Trinity*, 3. Term Rep. 605. And see Mr. Const's edit. of Bott's Poor Laws, page 578. sect. vi. where all these cases are collected.

Case 101. The Parish of St. Giles's in Reading against The Parish of Everly, Blackwater.

IF a person born in the parish of *A.* be put apprentice in the parish of *B.* and after serving two years of his time, on his master becoming bankrupt, he return to the parish of *A.* marries, has children, and dies without having gained a settlement there, his widow and children are settled in the parish of *B.* although neither of them were ever there during the life-time of the husband and father.—S. C. 2. Ld. Ray. 1332. S. C. Sett. and Rem. 110. S. C. Shaw P. L. 226. S. C. 2. Seff. Cases, 116. S. C. 1. Stra. 580. S. C. And. 350.

tice in the parish of *Everfly*; and having served two years of his apprenticeship there, his master broke, and then this apprentice came back to *Reading*, which was the place of his birth, and there he married, and had these children, and in some time afterwards he died. There were endeavours in his life-time to remove him to *Everfly*, where he had served two years of his apprenticeship, but he was not actually removed. But after his death his widow and children were, by order of two justices, sent to the said parish of *Everfly*.

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OF
ST. GILES'S
IN READING,
against
THE PARISH
OF EVERSLEY,
BLACKWATER

Upon an appeal to the next sessions, that order was quashed, and an order made, that they shall be sent back to the parish of *St. Giles's*, because the wife before her marriage had a lawful settlement there. And now both these orders being removed into the court of king's bench by *certiorari*,

IT WAS MOVED to quash the order of sessions, for that the settlement of the children ought to follow the settlement of the father (a).

THE CHIEF JUSTICE was of opinion, that during the life-time of the father the settlement of the children must be where he was settled, and thither they may be sent; * but if he had no legal settlement, then the children must be sent to the place where they were born. Now the father of these children being dead, and some attempt being made to remove him in his life-time, though he was not actually removed, yet that shews his settlement was contended; and the children being born under such a contested settlement, must be sent to the place of their birth; though it might have been otherwise, if there had been no contest (b).

* [170]

But TWO JUDGES were of a contrary opinion, viz. that after the death of the husband who was the father of these children, both their mother and the children ought to be sent to the place where he had a lawful settlement; and that his death (in this case) made no alteration as to the settlement; for wherever the husband and father had a legal settlement, the widow and children gain a settlement there. Nor doth it alter the case, though the wife had another settlement before her marriage, because by her marriage that settlement was lost, and birth gains a settlement of the children in no case but where the settlement of their father or mother is not known (excepting only in cases of bastardy), and there it gains a settlement only *prima facie* until the legal settlement is known, and no longer; and the reason is, because the children

(a) T. Raym. 476. 2. Salk. 528. pl. 12. 6. Mod. 87. Fortesc. Rep. 322. Set. and Rem. 241. pl. 281. 244. pl. 282. 3. Salk. 259. pl. 14. Cas. Temp. Holt, Ch. J. 578. pl. 15.

(b) Lord Raymond, Lord Fortescue Aland, Policy and Andrews, all report that PRATT, Chief Justice, entirely agreed with the other Judges, who were all upon the bench,

and unanimous. 2. Ld. Raym. 1332. Fortesc. Rep. 320. Fol. 398. Andr. 350. But Sir John Strange says, that three Judges were of opinion against RAYMOND, Justice, Stra. 580. However, Lord Raymond hath himself informed us that he agreed with his brothers, 2. Ld. Raym. 1332.—NOTE to the former edition.

THE PARISH
OF
ST. GILES'S
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should not be vagrants.⁹ It is true, a servant may be settled in a place where his master had no settlement; as if he was a visitor or scholar; for that service which is the foundation of his settlement is entirely independent of his master; but that is not like the present case, viz. the settlement of a child by virtue of the settlement of his parents; because by the law of nature they are to provide for their children, so that their settlement must necessarily depend upon that of their parents (a).

Afterwards by the unanimous opinion of THE COURT, the order of sessions was quashed, and the order of the justices confirmed.

(a) See Coxwell v. Shillingford, Fort. 313. Reg. v. Clifton, 19. Viner Abr. 382. Rex v. St Giles, Fort. 269. Rex v. Ironacton, 2. Burr. 153. Bottriph's, 2. Burr. S. C. 367. And see Mr. Confl's edit. Bott P. L. 2. vol. 19. to 29.

* [171]

Case 102.

* Grey against Mendez.

To *indebitatus assumpsit* brought by assignees of a bankrupt, if the defendant plead *non assumpsit infra sex annos*, the plaintiff cannot reply the bankruptcy and assignment made within six years, for the statute continues to run from the time of the original promise to the bankrupt, notwithstanding the bankruptcy intervenes.

S. C. 1. Stra.
556.
S. C. Cas. in Eq.
171.
3. Peer. Wms.
143.
4. Term Rep.
300. 306.

INDEBITATUS ASSUMPSIT brought against the defendant by an assignee of commissioners of bankrupts. The defendant pleaded the statute of Limitations, "*non assumpsit infra sex annos, et sic nil debet.*" The plaintiff replied, that the assignment by the commissioners, &c. was made to him on such a day, in the fourth year of the reign of George the First. The defendant demurred to the replication.

IT WAS ARGUED for the defendant, that the replication was ill, because the plaintiff did not set forth how the person became a bankrupt, viz. that he was indebted to any person, &c. and absconded, or had done any other act of bankruptcy; but if he had set forth this matter, it does not appear by the pleadings that the defendant made any promise to the bankrupt himself within six years, or that the case of bankrupts was within the saving of the statute of Limitations, by which it is enacted, "that actions on the case for slander must be commenced within two years after the words spoken; and all actions of trespass, of assault, battery and wounding, and false imprisonment, must be commenced within four years after the cause of suit, and all other actions on the case, actions for account (other than such as concern merchandize), actions of debt, detinue, trespass, trover and replevin, must be brought within six years after the cause of such actions and suits, and not after." But the right of action in the cases aforesaid is saved to "infants, *feme covert*s, persons *non compos mentis*, persons imprisoned or beyond sea, so as they commence their suits within the times above limited respectively, after their imperfections removed;" but the right of *bankrupts* is not mentioned.

Trinity Term, 9. Geo. 1. In B. R.

THE COUNSEL for the plaintiff (the assignee) admitted this; but they insisted, that the right to this action was a new right vested in him by act of parliament.

To which it was answered, AND SO RESOLVED by the Court, that the statutes of bankruptcy transfer the right to the assignee; but it is no more than the old right which the bankrupt had before he committed any act of bankruptcy, * and therefore the assignee must take it in the same plight and condition as the bankrupt himself had it; and so it has been adjudged in the case of *Mason v. Plunkett*, that the assignee was in the same condition, as to the right, with the bankrupt himself, and consequently if he was barred by the statute of Limitations, so shall the assignee (a).

(a) *Same Point*, *Ashbrook v. Manley*, Comb. 70. *South Sea Company v. Wyndham*, 3. Peer Wms. 143.

GREY
against
MENDIZ.

Cro Car 139.

249. 513.

LEV. 1. 1.

2. Lev. 166.

Sid. 305.

2. Mod. 212.

* [172]

Jones against Thurloe.

Case 103.

TROVER brought by a common carrier against an inn-keeper, for keeping the plaintiff's horse, and converting him to his own use. The defendant pleads, that he is an inn-keeper, and that the carrier owed him so much money for horse-meat at several times (all of which he set forth in his plea), and that by the custom of the realm, an inn-keeper may detain horses for their keeping; and that he, this defendant, on such a night, detained the plaintiff's horse for what was due to him, &c. which is the same trover and conversion of which the plaintiff complained, &c.

An inn-keeper has a right to detain a horse for the expences of his keep; but he cannot sell the horse and by that means pay himself; and if by suffering the horse to depart, or by any other means, he gives credit to the owner, he cannot afterwards detain him upon his coming again into his possession.

THE COURT, upon a demurrer to this plea, was of opinion, that by the custom of the realm, if a man lie in an inn one night, the inn-keeper may detain his horses until he is paid for the expences; but if he give him credit for that time, and let him depart without payment, then he has waived the benefit of that custom by his own consent to the departure, and shall never afterwards detain the horse for that expence. For this custom is founded on the hardship of the inn-keeper's case to sue for every little debt, or on a greater hardship, that he may not know where to find him who was his guest after he is gone; therefore when he has waived that privilege which the law gives him, he must rely on his other agreement. Now, in the principal case, the inn-keeper having seized his horse for the expences of several nights, and not for one night, and no more (which he might lawfully do), such seizure is not lawful, and by consequence it is a good evidence of the conversion.

S. C. 1. Stra.

557.

Moor 876.

2 Roll. Abr.

85, 80.

3. Eult. 268.

1. Roll. Rep.

449.

1. Salk 388.

2. Br. wil. 254.

2. Ed. Ray 752.

Etp. D. G. 584.

2. Show. 161.

* [173]

THE CHIEF JUSTICE, in the argument of this case, held, that though the inn-keeper might detain a horse for his meat for one night, yet he could not sell the horse and pay himself; if he * did, it was a conversion (a), for he is not to be his own carver.

(a) 1. Vent. 71. See also 2. Show. 162, *notis.* Salk. 655. Id. Ray. 752. 3. Burr. 1473. 5. Burr. 2827.

Case 104.

Wilkinson *against* Meyer.

Where the covenants are mutual, a request to perform them is not necessary.

S. C. post. 232. but seems not to be S. P.

S. C. 1. Stra.

585.

S. C. 2. Ld. Ray.

1350.

COVENANT upon an agreement in writing for *South Sea* stock, wherein the plaintiff covenanted by indenture to transfer the stock before the twenty-fifth day of *March*, or within four days after; and the defendant covenanted to accept the same, and to pay so much money for it, *infra tempus prædict.* which he had not paid.

The defendant demurred to the declaration.

IT WAS INSISTED *for the defendant*, that here was an indefinite time set forth for the performance of this covenant, therefore the plaintiff ought to have set forth a request to perform it, otherwise he cannot be entitled to this action.

THE COURT. This is a mutual covenant, and in such case the plaintiff may maintain his action without laying any request made by him to the defendant to perform it, or that he on his part was ready, and offered to perform it; for the time is not indefinite, as has been suggested, because the defendant was to accept the stock, and pay the money *infra tempus prædict.* which must be within the four days; and therefore there is no occasion to aver a request in this declaration: this case is the same with that of *Blackwell v. Nash (a)*, only in that case one day was appointed, and here are four days.

Judgment for the plaintiff.

(a) Ant, 105.

Case 105.

Woolley *against* Briscoe.

Tuesday 18 June 1723.

Where the issue is immaterial, and where the defendant shall not take advantage of a bad replication.

S. C. 2. Stra.

554.

BY the statute 7. Geo. 1. c. 1. it is enacted, "that every contract for sale, or purchase of subscriptions, or stock of the *South Sea* Company, which shall be unperformed, or shall not be compounded between the parties thereto, by the twentieth of *September* 1721, or an abstract or memorial thereof signed by the party interested therein, and who shall be entitled to take advantage of the same, shall be entered in books kept for that purpose by the Company, to whose capital such stock doth relate, at some time before the first of *November* 1721, and in default of such entry, every such contract (as to so much thereof as shall remain unperformed, or not compounded by the twentieth of *September* 1721) shall be void."

* [174]

* The plaintiff brought an action against the defendant, to whom he (the plaintiff) had sold some *South Sea* stock, and entitled himself to the action, by averring that he tendered the stock at the day and place agreed on, but that the defendant did not accept the same, or pay the money.

The

Trinity Term, 9. Geo. 1. In B. R.

The defendant pleaded, that the contract for the sale of the said stock was not entered in the Company's books, at any time before the first day of *November 1720*, *secundum formam statuti*, so that the said contract was void.

WOOLLEY
against
BRISCOE.

The plaintiff replied, that the said contract was entered, &c. before the first day of *November 1720*, *secundum formam statuti*, upon which they were at issue, and the plaintiff had a verdict.

IT WAS MOVED *in arrest of judgment*, that this was an *immaterial issue*, for there is no affirmative and negative, and consequently there ought to be a *repleader*.

TO WHICH *it was answered*, that the substance of this replication is, that the contract was entered *secundum formam statuti*: it is true, the day and year are mentioned, but that shall be rejected as surplusage.

THE COURT. A plea alledging that the contract was not registered *secundum formam statuti*, would be sufficient; and if so, the day may be here rejected, especially being immaterial, and not pursuant to the directions of the act. This seems a reasonable construction of this pleading, especially since there has been a verdict for the plaintiff on the substance: the declaration is a good declaration, and so is the plea in substance though not in form; and for want of form in his own plea the defendant shall never take advantage by repleader. Dougl. 94

Judgment for the plaintiff.

The King against Ford.

Case 106.

THE DEFENDANT was convicted upon the statute 3. Car. 1. c. 3. by which it is enacted, "that none shall keep an alehouse without licence, on pain of forfeiture of twenty shillings to the poor, &c."

IT WAS MOVED to quash this conviction, because alehouse-keepers selling ale without licence are punishable by former statutes, particularly by the statute 5. & 6. Edw. 6. c. 25. which enacts, "that none shall keep alehouses without a licence granted, either in sessions, or by two justices (*quorum unus*) on pain of three days imprisonment, without bail." * Now it does not appear in this case, but that the defendant might be licensed by two justices of peace according to that statute; and if so, then this conviction ought to be quashed.

An indictment for selling ale without any licence whatever, and against the statutes 3. Car. 1. c. 3. is good, without averring that he was not licensed according to 5. & 6. Edw. 6. c. 25.

* [175]

S. C. 1. Stra.

555.

S. C. 2. Seff.

Cases. 264.

1. Term Rep.

322.

THE COURT. The statute 5. & 6. Edw. 6. c. 25. is entirely out of the case, because it is alledged in the indictment, that the defendant sold ale "contrary to the statute 3. Car. 1. c. 3." and it being likewise averred, that he sold it *sine aliquâ licentiâ quâcunque*, the objection that he might be licensed by two justices is of no weight.

Case 107.

The King *against* Ashton.

A summary conviction on the 1. Geo. 1. c. 48. for destroying fruit-trees, must state judgment of forfeiture, and the particular punishment prescribed by the statute, for if it only say *quod convictus est*, it is erroneous.

S. C. 1. Saff. Cases, 346.
1. Salk. 378.
383.
Stra. 858.

THE WIFE of *Ashton* was convicted by two justices upon the statute 1. Geo. 1. c. 48. for destroying fruit-trees, the punishment for which offence is, to be sent to the house of correction for three months, and to be publickly whipped once in every month during that time.

IT WAS MOVED to *quash* this conviction,

FIRST, Because it did not specify the punishment inflicted by that statute; for that being a particular punishment, *viz.* "to be sent to the house of correction for three months, &c." ought to be set forth in the conviction specially, since this offence is to be heard and finally determined by the justices.

SECONDLY, It is only a conviction of the offence, *ideo considerationem est per nos quod convictus est.*

WE ARG, *contra.* FIRST, There are two distinct punishments inflicted by the statute according to the circumstances of the case; for if the offence be committed where there is a HOUSE OF CORRECTION, the offender is to be imprisoned for three months; and if none, then for four months in THE COMMON GAOL, so that the authorities to convict and to commit are distinct.

SECONDLY, No judgment is necessary; for it has been held that a wrong judgment, or an erroneous distribution of a penalty, will not vitiate a conviction.

THE COURT seemed clear to *quash* the conviction, for there ought always to be a judgment, "*quod forisfaciat*," or "*quod committatur*," for the act gives no pecuniary forfeiture (a).

(a) In the case of *Rex v. Hawkes*, a conviction for killing a deer was *quashed* because it was only *convictus est*, without any judgment *quod forisfaciat*, 2. Stra. 858. The same point was also adjudged in *Rex v. Vipont*, and also that where the statute does not fix the duration of the punishment, but leaves the time of imprisonment quite discretionary, *viz.* "for any time not exceeding three months," the duration of the commitment must be ascertained upon the conviction, 2. Burr. Rep. 1166. See also *Reg. v. Barret*, Salk. 383. *Rex v. Abraham*, Cowp. 60. *Rex v. Dinwley*, 2. Term Rep. 96.

sonment quite discretionary, *viz.* "for any time not exceeding three months," the duration of the commitment must be ascertained upon the conviction, 2. Burr. Rep. 1166. See also *Reg. v. Barret*, Salk. 383. *Rex v. Abraham*, Cowp. 60. *Rex v. Dinwley*, 2. Term Rep. 96.

* [176]

Case 108.

* *Cooke against* Wingfeild.

After sentence in the spiritual court for defamatory words, the Court will not grant a prohibition on a suggestion that by custom they were only cognizable in *London*.—S. C. 1. Stra. 556. S. C. Fort. 347. S. C. And. 300. Ante, 115. Post. 194. B. R. 11. 317. Bunt. 312. 1. Com. Dig. "Admiralty" (E. 9.). 6. Com. Dig. "Prohibition" (1) (G. 14.).

A LIBEL was exhibited against the defendant for defamatory words spoken by him in *London*, and after sentence he moved for a prohibition, and obtained a rule, that the plaintiff should shew cause, &c. why a prohibition should not go.

The cause now shewn was, that it ought to appear on the face of the libel, that the matter is not of spiritual consequence; other-

wife that court shall not be prohibited, especially after sentence; but no such thing appears on this libel, for the defendant only suggests *a custom* in *London*, that defamatory words spoken there are actionable, which ought not to be suggested, nor any thing offered in proof which is out of the libel, especially since the defendant has submitted so far to the jurisdiction of the spiritual court until sentence was given against him. If there had been any such custom, he ought to have pleaded *in bar* to the jurisdiction of that court, for the courts at *Westminster* are not *ex officio* to take judicial notice, that there is any such custom in *London*.

COOKE
against
WINGFIELD.

THE COURT. There is a difference between a motion of this kind before and after sentence in the spiritual court; for in the one case this custom need not be proved by affidavit, because it is sufficiently known (a), but a judicial notice shall never be taken of it after sentence.

So the rule was discharged (b).

(a) But see *Staunton v. Jones*, Dougl. 380, *note*.

(b) See *Argyle v. Hunt*, 1. Stra. 187. Fort. 347.

Huxfer against Gapan.

Case 109.

TROVER for *a ring*. The defendant moved for leave to bring it into court, and that it might be struck out of the declaration. Amendment of a declaration in trover.

THE COURT. This is an action for damages founded on a supposed conversion: the motion must be denied; but if it had been an action of detinue, it would have been granted. Salk. 597.

THE PLAINTIFF then moved for leave to amend his declaration, and add more counts to it, having only declared for fifteen shillings damages, and this was to give the Court jurisdiction; * and though this was strongly opposed on the other side, he had leave to amend. * [177]

PER CURIAM. In trover the conversion is the point in issue (a), for which the time and place should certainly be alledged.

(a) *Hubbard's Case*, Cro. Eliz. 79. *Stranham's Case*, Cro. Eliz. 93. See *Preston v. Tooley*, Cro. Eliz. 74. also Bull. N. P. 46.

The King against Erbury.

Case 110.

MR. ERBURY being apprehended by virtue of a warrant from A person out-
THE SECRETARY OF STATE, for being the author of a sedition-
libel, was bailed to appear in the court of king's bench the first day of *Easter Term* last, and he appeared accordingly. laved on an in-
dictment for a
libel found at Es-
sex and removed
into the king's bench, may be bailed upon shewing probable cause of error, although no writ of error
be actually allowed; for in such case he need not, by 4. & 5. *Will. 3. May*, c. 18. assign error
in *fact*; and THE WRIT is *ex debito justitiæ*.—Fort. 37.

THE KING
against
ERBUAY.

THE ATTORNEY-GENERAL moved, that he might be committed, because he was outlawed upon an indictment at *Hicks's Hall*, for being the author of a seditious libel, entitled, "*The Clemency of the Kings of England*," and thereupon he was committed.

The indictment, together with the outlawry, were removed hither by *certiorari*.

Upon another day being brought up by *habeas corpus*, he moved by his Counsel to be bailed, upon statute 4. & 5. *Will. & Mary*, c. 18. in order to prosecute a writ of error, for the reversal of the outlawry.

THE ATTORNEY-GENERAL opposed this motion, for that he was not entitled to so much favour *ex debito justitiæ*, before he had brought a writ of error to reverse the outlawry.

The defendant then produced some affidavits to shew that he had done all in his power to have a writ of error allowed, and that he had applied to the secretary's office for that purpose.

THE ATTORNEY-GENERAL answered, that if the Doctor had made any application to him, he would have signed a *fiat* at any time, which he having neglected to do, such neglect ought not to be any excuse to him (a).

PRATT, *Chief Justice*, was of opinion, that his outlawry was a confession of his crime, and equal to a conviction; and therefore if he had brought a writ of error, the Court might have refused to bail him. He denied it to be within the act.

But Powys's, *Justice*, seemed to think that it was within it.

EYRE, *Justice*, at first took it not to be within the act; but he afterwards declared himself of opinion that it was within the letter and meaning: he said, the general recital to the statute seems to extend only to outlawries prosecuted in the court of king's bench. But the title of the act is general, "For preventing malicious informations in the court of king's bench, and for the more easy reversal of outlawries in the same court." And the introduction to the particular clause of this act is also general, "For

(a) It is said, S. C. Fortescue, 37. that the defendant, after having given notice to the Attorney-General, had moved in Easter Term for a writ of error, and that the Attorney-General opposed the granting of it, because in crown cases it was not to be allowed without a *sign manual* from the king; and formerly it was certainly understood, that writs of error in all criminal cases were not grantable *ex delicto justitiæ* but *ex gratiâ regis*, *Crawle v. Crawle*, 1. Vern. 170. *Rioters Case*, 1. Vern. 175. but it was agreed in the third of *Queen Anne*, that in misdemeanors

it ought to be granted as a matter of right, *Reg. v. Paty*, 2. Salk. 504. where there is probable cause of error, 4. Burr. 2550. and therefore even in misdemeanors it cannot now issue without the *fiat* of the Attorney-General, who is to examine whether it is sought for delay or on probable error, and if there be, the court of king's bench will order him to grant his *fiat*, 4. Burr. 2551. But in treason or felony, if the error be ever so manifest, the defendant cannot have a writ of error without a *sign manual* for that purpose, 4. Burr. 2551.

Trinity Term, 9. Geo. 1. In B. R.:

“ the more easy and speedy reversal of outlawries in the said court ;” and so is the enacting clause, “ that no person who shall be outlawed in the said court for any cause, matter or thing whatsoever (treason and felony only excepted), shall be compelled to come in person in or appear in person in the said court to reverse such outlawry; but may appear by attorney and reverse the same, without bail, in all cases except where special bail shall be ordered by the said court.” Now without question an outlawry at the sessions removed into this court by *certiorari* is an outlawry in this court, and consequently is within the letter of the act: and as it is within the letter, so it is within the reason of the law; for there can be no reasonable difference between an outlawry originally prosecuted in this court, and an outlawry removed hither by *certiorari*. Besides, by a subsequent clause of the act the sheriff who arrests the defendant on a *capias utlagatum* may take an appearance or special bail, where special bail is required in the action: and if the sheriff has power to bail the defendant in any case, without doubt this Court has the like power; and it would be very hard if it should be otherwise; for this man ought not always to be imprisoned for a misdemeanor or a contempt, the outlawry being no more than a contempt of the law, and a means to compel him to answer; and as yet he is under no conviction; and the bail he is to give is only to prosecute his writ of error with effect.

THE KING
against
ERRANT.

* [178]

FORTESCUE, *Justice*, was strongly of the same opinion.

PRATT, *Chief Justice*, then desired the Counsel for the defendant to shew some colourable error to reverse this outlawry, so that it may appear to the Court it is not for delay, and to avoid justice.

THE COUNSEL replied, that they intended to follow the common practice, as in cases of this nature, and that they would assign errors in fact, which probably might be confessed by THE ATTORNEY-GENERAL, upon giving bail to answer the trial of the merits upon this information.

And thereupon the solicitor for the defendant exhibited a petition to THE ATTORNEY-GENERAL for a writ of error, who signed a *fiat* in court.

And then his Counsel said, that they would take out the writ the next seal-day, and that this being the last day of the Term, it would be hard to continue him in custody all the Vacation, especially when it appeared to the Court, that the writ of error was prosecuted for his discharge.

THE COURT. The defendant not having bail ready in court, may be bailed at a Judge's chambers, shewing some error.

Case 111.

Harrison against Green (a).

"*Non assumpsit*"
is a good plea to
an action
brought against
a common carrier.

Cro. El. 47c pl.
29.
Noy Rep. 56
Lev. Rep. 142.
Browl. 8.
Al. 77.
Com. 2. p. 10.
Comb. 17, 180.
Carr. 371.
L. Raym. 60.
Sd. 236 pl. 2.
2 James, 252,
253.

ACTION ON THE CASE against a common carrier for detaining the plaintiff's goods until they were spoiled.

Upon *non assumpsit* pleaded, the plaintiff had a verdict.

IT WAS MOVED in *arrest of judgment*, that the issue and plea are improper; for *non assumpsit* is no plea to an action founded on a tort.

THE COURT. This action is founded on the general custom of the realm, and on that *assumpsit* which is implied by law on the carrier's receiving the goods; for by his receipt of the goods he implicitly undertakes to keep and deliver them safe; and *non assumpsit* is a proper plea, and the issue is proper enough.

And by PRATT, *Chief Justice*, and EYRE, *Justice*, judgment was given for the plaintiff.

(a) This case was determined in Michaelmas Term, in the 10. Geo. 1. 1723.—
NOTE to former edition.

* [172]

Case 112.

* The King against Thorogood.

If a person who
has made an af-
fidavit in the
court of com-
mon pleas, ap-
pear on for-
mors, and con-
fess to be false,
the Court may
record the con-
fession, and or-
der him to be
in the pillory for
perjury.

THE DEFENDANT having made an affidavit in the court of common pleas, and the truth thereof being controverted, he was summoned to appear in court, and accordingly did appear in *Easter Term* last, and *confessed* that he had made the affidavit, and that it was false. Whereupon that Court recorded his confession, and ordered that he should be taken into custody, and put in **THE PILLORY** for perjury (a).

IT WAS NOW INSISTED by his Counsel, that this could not be done upon his own *confession*, because it is not a *conviction*, but only *matter of evidence*, for he ought judicially to be brought before the Court by indictment, and therefore his *confession* ought not to have been recorded. Besides, the court of common pleas has no jurisdiction in criminal cases, and therefore if it had appeared on record, that the defendant was perjured, that Court could not have punished him.

ON THE OTHER SIDE—To argue that a criminal shall not be convicted upon his own *confession*, is not only a new, but a very strange doctrine, because the confession of a crime is the strongest proof of guilt. It is likewise very strange to object that the court of common pleas has no jurisdiction in this case, because the punishment by **PILLORY** is by virtue of the statute 5. Eliz. c. 9.

(a) See Rex v. Middleton, Fort 201.
On a motion for attachment, the defend-
ant came voluntarily into court and con-
fessed that he was the author of a libel,

and the confession being recorded, he was
thereupon fined fifty pounds and order-
ed to find sureties for his good behaviour.
See also Mathias Carter's Case, post. 341.

and

and the Court having given a sentence accordingly, shews, that they proceeded on that statute, by which power is given to any court where the perjury is committed, to punish the offender; so that it is plain that court has a jurisdiction, especially since it is provided by that very statute, that it shall not extend to any ecclesiastical court; which being a negative pregnant, is a full proof that all other the king's courts may punish such offenders, and even those who shall be convicted by their own confession; for the statute gives power to "hear and determine by inquisition, information, bill, presentment, *or otherwise*, and to give judgment and award execution, &c." now by the word "*otherwise*," the confession of the party may be intended. Besides, if that court cannot punish the defendant by virtue of the statute 5. *Eliz.* c. 9. he might be punished at common law, for perjury is an offence at common law, and * any court may punish such a criminal for an offence committed *in facie curiæ*; which was the better opinion in *Bushel's Case* (a), though the Chief Justice VAUGHAN doubted it.

THE KING
against
THOROGOOD.

Lev. 155.

* [180]

But notwithstanding what was said by the defendant's Counsel, he was put in THE PILLORY the last day of the Term.

(a) Vaugh. 152.

The King *against* Powell and Others.

Case 113.

MOTION was made in this cause for leave to plead double: FIRST, To justify under the corporation, as a corporation by *prescription*; and, SECONDLY, as a corporation by virtue of the charter of Philip and Mary.

Double pleas denied.
See ante, 158.

THE COURT. The pleas are inconsistent; for after acceptance of a charter, the corporation can never be esteemed a corporation by prescription.

TRINITY TERM,

The Ninth of George the First,

ON

A Trial at Bar,

BEFORE

The Court of King's Bench,

Hiliard against Phaly and Others,

Case 114.

A TRIAL AT BAR on an issue directed out of the court of chancery.

The question was, Whether *Mr. Hiliard*, the plaintiff's brother, who was seised in fee of the lands in question, of the yearly value of six hundred pounds, was married to *Sgrah Phaly*, the mother and guardian of the defendant, before such a day, which was his birth-day? There were three other issues to the same purpose, she having three other sons.

The defendant (the infant) by his mother and guardian pleaded, that the said *Mr. Hiliard* was married to her before the birth of any of the defendants.

Upon which plea they were at issue; so that, the plea being in the affirmative, the proof was upon the defendants, which was as follows:

IT WAS SAID by their Counsel, that this plea being in favour of legitimation, in such case cohabitation has always been allowed to be good evidence (a).

It was in proof, that *Mr. Hiliard* cohabited with this woman above twenty years; that in such a year, &c. he came with her out of *Lincolnshire* to *London*, and lodged in *Wild street*, where they were married by a priest who served the *Portugal* ambassador; and it was proved, that such a priest was about that time

To prove that a woman was married antecedent to the birth of her child, cohabitation, reputation, and other circumstances, may be given in evidence; but an answer given in chancery by the mother respecting this fact, is not admissible during her life, for she may be examined to it *viva voce*; nor are proceedings in the spiritual court admissible.

B. R. H. 79.
I. Will. 340.

(a) See *May v. May*, Bull. N. P. 112. *St. Peter's, Worcester*, & *Old Swinford*, *Burr*, S. C. 25.

HILIARD
against
PHALY
AND OTHERS.

chaplain to the ambassador. That *Mr. Hiliard* was a *Roman catholic*, and for that reason there was no body present at the marriage, or who could prove that she was actually married, besides herself (a); but there was sufficient evidence, that he acknowledged she was his wife; and desired the witnesses to use her as such; and that on the day of his death, and but a few hours before he died, he declared in the presence of his physician and several others (who were now produced as witnesses) that he was married to her.

ON THE OTHER SIDE it was admitted, that this is a favourable issue, because it was to support legitimation; but it is to be favoured only where the matter is doubtful to the Court and to the jury, and not where there is such clear proof to the contrary, that there can be no room to doubt.

* [181]

* The proof was, that *Mr. Hiliard* took this woman long since to be his house-keeper; that soon afterwards she was with child, and that both of them went to *London* to avoid prosecution in the spiritual court; but yet after the birth of three of these children, he was prosecuted in that court for fornication with this woman, and that sentence was given against him, and penance enjoined, and that he actually paid the commutation money; that he ordered his servants not to call her mistress, but by her proper name, and that he frequently told his neighbours, and some of his most intimate acquaintance, that he was never married to this woman: Then THE PARSON of the parish deposed, that he knew this woman ever since she first became a servant to *Mr. Hiliard*, and that he always took her to be his concubine, and not his wife.

But to obviate the parson's evidence, there was a letter produced under his hand in very endearing words and expressions, wherein he assured her, that if she would marry him, then he would assist her to baffle all the attempts of her enemies to disprove her marriage with *Mr. Hiliard*; and being asked by THE CHIEF JUSTICE what could induce him to write such a letter, if he took her to be a servant and a concubine; the parson answered, that greater men than he had married servants (b).

It was farther proved on *the plaintiff's* side, that upon the death of *Mr. Hiliard* this woman got into her custody all the writings concerning the inheritance of these lands; and upon a bill in chancery exhibited against her to discover the same, she answered, that she was married to *Mr. Hiliard* about three years before he died, and so insisted to keep the writings.

(a) In Lord Valentia's Case, adjudged in the House of Lords, 22 April 1771, where the question was, Whether the Earl of Arglesea was married to the Countess Dowager of Anglesea on the 15 September 1741, prior to the birth of Lord Valentia, their son, who was born in the year 1744; the Countess Dowager having no interest was admitted a wit-

ness to prove the fact of the marriage Cited by LORD MANSFIELD in the case of Goodright v. Moss, Cowp. 593. See also Stapleton v. Stapleton, 1. Atk. 4.

(b) Lord Chief Justice Pratt, who asked him the question married his maid servant, which the parson, it is supposed, hinted at.—NOTE to the former editions.

Trinity Term, 9. Geo. 1. In B. R.

This answer was now offered to be given in evidence.

But it was opposed on the other side; for though it might be conclusive against herself, if she pretended to any dower, or to a jointure, yet it cannot be given in evidence against a third person not deriving any title under her.

HILIARD
against
PHALY
AND OTHERS.

And THE COURT being of that opinion, the answer was not read.

Then they offered to give the proceedings in the spiritual court in evidence.

But that was likewise denied, because what was done in the spiritual court cannot be evidence at common law where the title of lands is in question.

So the jury gave a verdict for the defendants.

* But THE LORD CHANCELLOR thought it hard that such evidence had been rejected; for as to the answer in chancery, he said, that it was plain, where there is any confidence or trust between the parties, the confession of one in an answer, &c. might be given in evidence against the other, though it might be a question whether such evidence was conclusive, or not (*a*).

* [182]

Then as to the proceedings in the spiritual court, admitting there had been a marriage in this case, and they had afterwards been divorced for consanguinity or affinity, such sentence of divorce would have been conclusive evidence to bastardise the children born in wedlock before the divorce; and what could be better evidence in a court of law to shew there was no marriage, than a sentence in the spiritual court carried on in a regular suit, and pronounced in the life-time of the parties, that they were guilty of fornication, and the proof of the commutation-money paid by the supposed father.

(c) See the case of Goodright v. Moss, where it is decided that *general declarations*, or the *avowal* of a parent in chancery, are good evidence, after the death of such

parent, to prove that a child was born *before marriage*, but not to prove that a child born *in wedlock* is a *bastard*, Cowp. 591.

MICHAELMAS TERM,

The Tenth of George the First,

I N

The King's Bench.

1723.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

[183].

- The Case of the Dean of Trinity-Chapel in Dublin Case 115.
against The Archbishop of Dublin.

UPON A WRIT OF ERROR brought in the king's bench in *Ireland*, on a judgment given in the common pleas there, Where the ordinary is visitor of a royal foundation.

THE CASE was thus : The *archbishop of Dublin* libelled in the spiritual court there against the *dean and chapter of Trinity-Chapel* there, for denying to admit him to visit them. The defendants suggested for *a prohibition*, that the said chapel was of royal foundation, being first A MONASTERY of royal foundation, and afterwards translated into a deanery and chapter, and being a donative was exempted from the visitation of the ordinary. And thereupon a prohibition was granted, and that the plaintiff should declare upon it, which he did, setting forth, that this chapel was of royal foundation, and that the ordinary had no visitatorial power there but what he had by virtue of the letters patent of creation made by *Henry the Eighth*, in the thirty-third year of his reign, by which it is expressly provided, that the *Archbishop* shall have no power or control over the deanery but such as he had over THE PRIOR AND CONVENT of the *Holy Trinity* time out of mind, which priory was of

Stra. 536.
Fortesc. Rep. 329.
9. Viner, 475.
2. Bro. Cases in P. 554.

able on such a day, and that the archbishop did not * appear within five Terms afterwards, so that the cause was discontinued.

THE CASE OF
THE DEAN
OF TRINITY
CHAPEL
IN DUBLIN
against
THE
ARCHBISHOP
OF DUBLIN.

To which it was answered, that the defendant in error may come in at any time ; nay, he need not come in at all until the plaintiff assign errors. It is true, he may come in if he pleases, and bring a *scire facias* to compel the plaintiff to assign errors ; but this is at his election ; which THE COURT agreed.

THE COURT afterwards affirmed the judgment of the king's bench in *Ireland*.

A WRIT OF ERROR was thereupon brought in THE HOUSE OF PEERS, and there this cause was argued upon the merits.

THE CASE, as it stands upon the pleadings, is thus : The *archbishop of Dublin* proposed a visitation of this deanery, as he was ordinary of the place ; and the plaintiff in the prohibition not attending, he was prosecuted by the *Archbishop* in the spiritual court there, and thereupon the plaintiff moved for a *prohibition*, and had it, upon a suggestion, that this chapel was of royal foundation, and therefore exempted from any visitatorial power of the ordinary.

IT WAS ARGUED *for the dean*, that it was to be visited only by THE KING or his *chancellor*, but not by the *ordinary*, because it was a royal foundation ; that when this was created a deanery by the letters patent of the thirty third year of *Henry the Eighth*, it was provided by the letters patent of creation, that the *Archbishop* should have no power over THE DEANERY, other than what he had before over THE PRIORY ; therefore if he had any right, he ought to have pleaded it, and to have set forth what power he had over THE PRIORY ; otherwise his plea is immaterial.

ON THE OTHER SIDE it was argued, that this being an ecclesiastical corporation is by common intendment subject to the visitation of the ordinary of the place, unless by the letters patent of creation there had been a visitor appointed by the founder ; for all such corporations are *prima facie* subject to the jurisdiction of the ordinary, though they were founded by the crown ; and so is *Corbett's Case*, in *Dyer* 273.

The only material point is, Whether this was a royal foundation, or not, which was not the point in the case of this *Archbishop* and *Dr. Harrison* some years past, who was a prebend of this church ; for if the priory was not of royal foundation, the deanery into which it was translated by letters patent cannot be so ; but if it was of royal foundation, then the translation into dean and chapter * is no prejudice to the founder, for he remains founder still, for nothing is altered but the monastic rule and habit ; and so it was held in the (*a*) *Dean and Chapter of Nor-*

* [186]

able on such a day, and that the archbishop did not * appear within five Terms afterwards, so that the cause was discontinued.

THE CASE
TAKEN
OF THE
CHAPEL
IN DUBLIN
AGAINST
THE
ARCHBISHOP
OF DUBLIN

To which it was answered, that the defendant in error may come in at any time ; nay, he need not come in at all until the plaintiff assign errors. It is true, he may come in if he pleases, and bring a *scire facias* to compel the plaintiff to assign errors ; but this is at his election ; which THE COURT agreed.

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ON THE OTHER SIDE it was argued, that this being an ecclesiastical corporation is by common intendment subject to the visitation of the ordinary of the place ; unless by the letters patent of creation there had been a visitor appointed by the founder ; for all such corporations are *prima facie* subject to the jurisdiction of the ordinary, though they were founded by the crown ; and so is *Corbett's Case*, in *Dyer* 273.

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THE CASE OF
THE DEAN
OF TRINITY-
CHAPEL
IN DUBLIN

against
THE
ARCHBISHOP
OF DUBLIN.

wich's Case, in the thirtieth year of *Henry the Eighth*; in which year, and by that king, the priory and convent of the cathedral church of the *Holy Trinity of Norwich* was translated into the dean and chapter.

Therefore if nothing is altered by the translation, then by consequence the founder is not deprived of his right of patronage, neither is the visitor deprived of his right of visitation, because it is still the same body corporate, though by another name.

The judgment was affirmed.

Case 116.

The King *against* The Mayor of Tiverton.

An information lies against the mayor of a corporation for absenting himself on the charter day of election, and thereby preventing the election of a successor.

Post. 245.

Strange, 527.

2. Ld. Ray.

1377.

5. Burr. 2464.

3. Bac. Abr.

251.

UPON A MOTION for an information against the defendant for bribery, at an election of a new mayor for the corporation of *Tiverton*, in *Devonshire*; who when he found he could not succeed in the choice of the defendant (the old mayor) withdrew himself on the day of election, so that a new mayor could not be chosen, though the common-council did all in their power to proceed to an election, by appearing on the stairs in the town-hall for that purpose, but the door was locked by the defendant (the old mayor), and a book belonging to the corporation was taken away; so that for want of choosing a mayor on the day of election the corporation was dissolved.

THE CHIEF JUSTICE, who was formerly recorder of this corporation, said, that there was a difference amongst the members thereof about recalcency; so the rule was made to shew cause why an information should not go.

Bribery is a good cause to remove a corporator from his office.

Afterwards, in *Hilary Term*, it appeared; that there was bribery on both sides; so informations were filed against both parties; and the Court agreed, that bribery was a sufficient cause to remove a man from his office, and that it was an offence by which the very constitution of the Government might be altered.

* [187]

Case 117.

* Anonymous.

If a penal statute direct proceeding by information or indictment, and the grand jury has found an indictment, the Court will not file an information, although the indictment is quashed.

A MOTION for an information against the defendant, upon an affidavit of the prosecutor, that he had lost fifteen pounds, or thereabout, to the defendant, at one sitting.

The words of the statute 9. *Anne*, c. 14. are, "Any person winning at one time above the value of ten pounds, and being convicted thereof upon an information or indictment shall forfeit five times the value, &c."

THE COUNSEL on the other side objected, that the prosecutor had already indicted the defendant for the same offence, and that the GRAND JURY had found the bill.

This

This was true; but the defendant was not tried upon it, because it was quashed for insufficiency. ANONYMOUS.

THE COURT, however, would not give the prosecutor leave to file an information, for that THE GRAND JURY had already found a bill; and though the indictment was quashed, they might find another bill for the said offence; therefore there was no reason for this Court to interpose.

Crofts, Executor of Curtis, against Butel, the Bail of Case 118.
Harris.

AN ACTION was brought in the court of king's bench, and judgment obtained, and a writ of error brought returnable in the exchequer-chamber. Bail, in what method to be taken.

Two persons became bail to the writ of error before PRATT, Chief Justice; to which bail exception being taken, one justified himself in court, but the other did not; so that another additional bail was put in before POWYS, Justice, at his chambers in Sericants'-Inn, in Fleet-Street; on which entry before POWYS, Justice, the recognizance of bail was drawn up. The judgment being affirmed on the writ of error, two *scire facias*'s were brought in London against the bail, and two *nihil*s returned; and a *capias ad satisfaciendum* against the defendant, on which he was taken and imprisoned.

WHITAKER, Sericant, moved to discharge the defendant out of execution, and to set aside the proceedings on the *scire facias*.

FIRST, The entry of the recognizance is irregular. It ought to have been entered as taken before PRATT, Chief Justice, when the first bail was given. The bail which justified is bail from his first acknowledgment before the Judge; whereas if the recognizance shall be drawn up as entered into when the additional bail was given, he can be bound but from thence; so that if between those times he has aliened his lands, such alienation is good and binding.

SECONDLY, The *scire facias* is returnable on a day certain, which it ought not to be, the proceeding in the original cause being by bill.

THIRDLY, The *capias ad satisfaciendum* is irregular, because by the statute 3. Geo. 1. c. 25. it is enacted, "that the plaintiff shall mark on the back of the writ the real sum or debt due to him, before it is delivered to the sheriff to be executed;" and here there was no sum indorsed on the *capias*, nor any time mentioned in the entry of this recognizance; so void.

* FOURTHLY, The *scire facias* ought to have been brought in *Middlesex*, for the recognizance is filed there. Besides, the recognizance is a lien on the estate of the bail from the day that it was taken, * [188]

CROFTS,
EXECUTOR OF
CURTIS,
against
BUTEL,
THE BAIL OF
HARRIS.

taken, and it may be prejudicial to enter it on a future day, viz. on the day that the last recognizance was taken, because the person who entered into the first recognizance might have aliened his lands before the other was taken.

FIFTHLY, No *capias ad satisfaciendum* lies upon a recognizance of bail; for the tenor of the recognizance is, that the debt be levied *de bonis, catallis, terris, et tenementis*. The defendant ought to have appeared to this *scire facias*, and pleaded this wrong inrolment, and shall not now take advantage of it on a motion; but this sort of practice of taking bail at several times was settled in this court in the time of Chief Justice PARKER, and is an ease to defendants; for the first man is bail only *de bene esse*, and no bail is really given until the second man enters into the recognizance, for then it is complete, and not before. And the entry of the recognizance must be entire as if taken at once; and the constant practice is to take the recognizance as if the bail were both taken at the last Judge's chambers. The inconvenience which is objected, that the land may be aliened in the mean time, cannot properly be urged by the bail, since the only prejudice that can accrue thereby must arise to the plaintiff.

As to THE SECOND OBJECTION, that the *scire facias* is returnable on a day certain, which it ought not to be, the proceedings in the original cause being by bill; the return of the *scire facias* on a day certain is good, for the proceeding on which this *scire facias* is founded is the recognizance, which is an entire distinct charge and record from the former action; for that was determined by the judgment, and that record thereby closed; but if this proceeding should be adjudged a proceeding by bill, yet it is not any irregularity, but an error.

As to THE FOURTH OBJECTION, the distinction is between a recognizance taken by the Court, which is of no force till entered of record at *Westminster*, and then it is entered as taken in court; and a recognizance taken on the statute of 3. Jac. c. 8. For by that act a Judge at his chambers may take a recognizance of bail, which is obligatory by the caption, and gives the comuzee power of election to sue in *London* or *Middlesex*. 2. Salk. 600. pl. 10. 6. Mod. 42. 2. Ld. Raym. 1966. 11. Mod. 244. If this is an error, it may be taken advantage of by a writ of error upon the judgment on the *sci. fac.* or on the award of the execution.

As to THE FIFTH OBJECTION, Formerly it was held, that no *capias ad satisfaciendum* would lie on a recognizance of bail; but the latter resolutions have been contrary, and the constant practice has been accordingly. *Lev.* 226.

Then as to the not indorsing the *scire facias* on the recognizance, that doth not make the *capias* void. The statute requires it should be done, that an execution should not be taken for more than the real debt, and inflicts a penalty if it should be executed for a greater sum; it only subjects the party to the forfeiture of double

Michaelmas Term, 10. Geo. 1. In B. R.

AS TO THE LAST OBJECTION, the answer was, that the entry should be in *Middlesex*, and not in *London*, but that is of bail to actions brought in the court of king's bench, and not to original actions upon recognizances, as this is.

THE COURT. If the second bail had entered into a recognizance before the Chief Justice, as the first man did, that would not have related to the time of the first recognizance given by the other bail, and taken before the same Chief Justice; but here the second bail entered into a recognizance before another Judge, which makes no alteration of the case.

A Judge may take a recognizance of bail at his chamber, and the entry in his book is a good warrant for the entry of it in the office, and the practice is settled to take such recognizance at one time, and another at another time; for the first is *de bono esse*, and no complete bail is given till the last is taken, and from that taking the recognizance is made up; for such Judge before whom the last bail is taken signs the roll; therefore, though taken by different Judges, the first is of no value till the last is taken, for then the bail and the entry is entire and perfect, and not before.

SECONDLY, The return is good and proper; for the *scire facias* is not grounded on a proceeding by bill, but on a collateral matter.

THIRDLY, The *capias ad satisfaciendum* is good, though it is not indorsed.

FOURTHLY, The *scire facias* is well directed to the sheriff of *London*.

FIFTHLY, The body may be taken in execution on such recognizance.

PER CURIAM. The proceedings are regular.

Wherefore the motion was denied.

Williams against Lyons.

AN ACTION ON THE CASE was brought against the defendant for *criminal conversation* with the plaintiff's wife.

Upon *not guilty* pleaded, the cause was tried at the Sittings after the Term, and the jury gave a verdict for the plaintiff with two hundred pounds damages.

Afterwards the defendant used some indirect means with the plaintiff to take a small sum, and release the damages; and because he would not take thirty pounds, and give such a release, the defendant got a warrant of a justice of peace to take the plaintiff for a pretended murder. The warrant was executed on him on a *Sunday*; he was kept in custody till *Monday*; and then was arrested in an action of five hundred pounds at the suit of the defendant; all which was done to extort a release from him.

This appearing plainly to the Court, a rule was made for him, the constable, the bailiff, and the justice of peace's clerk, to shew cause why AN ATTACHMENT should not go against them.

CROFTS,
EXECUTOR OF
CURTIS,
against
BUTEL,
THE DEBIL OF
HARRIS.

A bond signed by one at one day, and by another at another day, shall relate to the first delivery.

Cro. Eliz. 622, 623.

* [189]

Case 119.

An attachment lies for endeavouring to intimidate a plaintiff, for the purpose of inducing him to take less damages than the jury gave.

Case 120.

Miller against Bradley.

If a judgment for the plaintiff be affirmed on a writ of error the last paper-day of the Term, a *testatum capias* may issue on the last day, returnable the first day of the ensuing Term.

2. Jones, 200.
1. Salk. 589.
5. Com. Dig.
"Process"
(E. 4).

A WRIT OF ERROR was brought on a judgment in the common pleas, and the judgment was affirmed in the court of king's bench the last paper-day of the last Term.

It was contended, that therefore the *capias ad satisfaciendum* must be returnable in this Term, because the judgment could not be signed until the *quarto die post*, &c.; if so, then the plaintiff having brought a *testatum capias ad satisfaciendum*, that must be irregular, because there could be no *capias ad satisfaciendum* on a judgment not signed, and by consequence nothing to ground a *testatum capias ad satisfaciendum*, especially this action being brought by original.

E contra. The objection is, that this action being brought by original, no *capias ad satisfaciendum* could issue before the judgment was signed; and it being obtained the last paper-day of the last Term, it could not be signed till after the *quarto die post*, &c. of this Term; so there being nothing to warrant a *capias ad satisfaciendum*, by consequence the *testatum capias ad satisfaciendum* must be irregular. * But when the judgment was signed, though in the latter end of the last Term, this by relation is a sufficient foundation to sue out a *capias* the first day of the Term, which will be a warrant to found a *testatum* returnable *tres Trinitatis*, and so good.

To WHICH it was answered, that though to some purposes the Term is but one day in law, yet to other purposes it is not so; as for instance, if there be *continuances*, there can be no judgment before they are entered, and the principal case being by original, there could be no judgment entered until the *quarto die post* of the following Term; so there could be no such judgment as is now set up to ground a *testatum capias ad satisfaciendum* (a).

THE COURT. This is a judgment of the first day of the Term, in which it was obtained by relation, which is sufficient to ground a *capias ad satisfaciendum*, and by consequence a *testatum capias ad satisfaciendum*; and if there is no difference between an action by bill and by original, it is regular. As to the *continuances* being carried on from one Term to another, no such thing appears on the record, so this execution is regular. It is true, if the *continuances* had been entered, no execution could be prior to such entry; and so is the case of *Prince v. Slaughter* (b), and *Dobson v. Bell* (c).

(a) See *Brand v. Mears*, 3. Term Rep. 388.; and *Coppertwaite v. Owen*, 3. Term Rep. 657.

(b) 2. Vent. 104.
(c) 2. Lev. 176.

Whitley *against* Loftus.

Case 121.

COVENANT on an indenture of apprenticeship, wherein the plaintiff covenanted with the father and son (the apprentice), and they on the other side covenanted with him (the plaintiff); and this action was brought jointly against the father and the son, for that the son had covenanted faithfully to account at his master's (the plaintiff's) request, for all such of his master's goods as should come to his hands.

In an action on a covenant by father and son that the son shall account, the declaration need not state a request to account.

The breach assigned was, that the defendant (the son) had not accounted, &c. ; and, upon *non infregit conventionem* pleaded, the plaintiff had a verdict.

IT WAS MOVED, *in arrest of judgment*,

FIRST, That the declaration was ill, because the plaintiff did not set forth any *request* made to the son to account, which he ought to have done, that the defendant might have an opportunity to traverse it.

SECONDLY, That the plea is too general, two breaches being assigned. Besides, it is no plea, for one breach is in the negative, that he did not account.

TO WHICH *it was answered*, that the breach is laid in this manner, that he did not account, *ratione cuius* he broke his covenant, which is an affirmative. Besides, this is an exception taken by the defendant to his own plea, and is after a verdict, which cures an informal issue.

* THIRDLY, That this being a joint action against the father and the son, and the breach assigned only against the son, this judgment cannot be maintained. * [191]

THE COURT said, the plea and issue are good after a verdict.

FOURTHLY, That the action ought not to be brought against the father, for he did not covenant that his son should truly account, &c. he only covenanted for himself separately, to pay the money which he was to give to the plaintiff for taking his son apprentice ; and the clause in the latter end of these articles is in the singular number, *viz.* that each of them (the father and son) binds himself for the true performance thereof ; so that the father cannot properly be said to be bound for his son, but only for himself.

IT WAS ARGUED *on the other side*, that this was a covenant entered into by the master on the one part, and by the son, with the consent of his father, on the binding part, but by both father and son as to all other purposes ; for though the son be only bound apprentice, yet they both covenant for the true performance of all covenants, &c. the words in the close of the articles being, " that each of them binds himself, &c. for the true performance of

WHITLEY
against
LOFTUS.

“all the covenants and agreements therein mentioned.” And even from the nature of these covenants, the father is always bound for the son; for otherwise masters could not rely on the covenants of their sons, who are commonly under age, and so by law not capable to consider what covenants to make; and consequently in this case the father shall be taken to covenant for the performance of his son's part as well as his own.

THE COURT was of opinion, that the very end of binding the father was to answer the wrong which might be done by the son to his master; therefore the father must be obliged for his son's true performance of the articles. It is a joint covenant, and amounts to the same as if it had been in this form: “It is agreed between the parties, that, &c.” It is true, at the end of the articles the covenant is in the singular number, “that each of them did bind himself,” and it must be so where the son is bound to perform the thing for which the covenant was made; and this clause is usually inserted, that the covenants may be taken distributively, “that each of the covenantors should perform his part;” the latter part makes the former covenants joint or several; and this makes the covenant of the son bind the father, who covenanted for him as well as for himself.

So the plaintiff had his judgment.

* [192]

Case 122.

* The Lord Coningsby against Steed.

Coroner being in
contempt was
committed.

A RULE was made, that THE CORONERS of the county of Hereford, and THE HIGH BAILIFF of the franchise of Leominster in the said county, should shew cause on such a day why an attachment should not issue against them.

THE CASE was as follows :

The defendant *Steed* was an attorney of this court, and formerly HIGH BAILIFF of the liberty or franchise of *Leominster*. He then entered into a bond of five hundred pounds for the faithful execution of the said office; but falling under the displeasure of *Lord Coningsby*, he brought an action of debt against *Steed* upon the bond, and sued out a *latitat* directed to the sheriff of that county, to which writ one of the coroners was attorney, and solicited the sheriff for a precept to the high bailiff of the franchise to make a warrant to apprehend the defendant *Steed*, who having brought his writ of privilege as an attorney of this court, and the sheriff having returned it upon the *latitat*, he would make no precept to the high bailiff, &c. Thereupon the plaintiff brought an *alias latitat* directed likewise to the said sheriff, who still refused to grant such precept as aforesaid, because of the privilege of the defendant, which he (the sheriff) had returned on the first *latitat*. An original was then sued forth, directed to THE CORONERS, who accordingly made a precept to the HIGH BAILIFF (who was privy to all these proceedings), and then he issued forth his warrant

to

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to the under bailiffs, who arrested the defendant, and still keep him in custody.

THE LORD
CONINGSBY
against
STEED.

THE COURT was now moved for an *attachment* against THE CORONERS, and the HIGH BAILIFF and UNDER BAILIFFS, for a great oppression, and for an abuse of the process of this court, under a pretence and colour of justice.

And a rule being made for them to shew cause why an attachment should not go,

IT WAS INSISTED on their behalf, by their Counsel, that though it was wrong to sue out this *latitat* directed to THE CORONERS, yet they being officers who are to execute the process of this court, are not to dispute or question, whether the writ is issued lawfully or not; neither are the HIGH BAILIFF or UNDER BAILIFFS to do any such thing, but all of them are to obey the writ; and if so, then the *affidavit* of the * defendant charges them with no crime but only in obeying the process; which is so far from being an offence, that it is probable, if the defendant had brought an action of false imprisonment against THE CORONERS and the rest, &c. they might have justified under this writ and warrant.

* [193]

THE COURT. A writ is never directed to THE CORONERS where the sheriff (who is the proper officer) stands indifferent; and it was admitted on all sides in this case, that the sheriff was indifferent; so that the matter seems to be very suspicious against THE CORONERS and the HIGH BAILIFF, *viz.* that they were privy to this oppression.

Therefore the rule was absolute as to them, but discharged as to the under bailiffs.

Afterwards, on the last day of *Hilary Term* following, one of the CORONERS was brought up in custody into court, and bailed, the other being bailed before, to answer upon interrogatories the next Term.

And accordingly *Edwards*, one of the coroners, and *Carpenter*, the high bailiff, were brought into court, the other coroner, *Landen*, being in the king's bench.

Edwards deposed, that he knew nothing of this oppression, nor acted therein otherwise than by a general power he gave to the other coroner, *Landen*, to put his (the said *Edwards's*) name to all writs that came to him directed to THE CORONERS, &c. and that he never saw this writ.

HIS COUNSEL thereupon moved, that he might be discharged; for if one coroner give the other authority to put his name to a particular writ, that might probably be a contempt to this court, because he might know the nature of such a single writ; but where such a general trust or power is reposed in one coroner by another as to set his name to all writs which shall come to his hands,

THE LORD
CONINGSBY
against
STRED.

hands, there cannot be so much as the least suspicion of any contempt.

THE COURT. This general authority must be intended to do all legal acts ; so that if the other coroner to whom it was given abuse it, such abuser cannot be a contempt by that coroner who gave the power.

Therefore this appearing to be the case of *Edwards*, one of the coroners, he was discharged.

But *Carpenter*, the HIGH BAILIFF, having owned that what he had done was by order of the plaintiff, and that he did it knowingly, though he did not advise the doing it, he, being in contempt, was committed.

* [194]

Case 123.

* Anonymous.

A prohibition will not lie after sentence, except for cause on the face of the proceedings.
Ante, 176.

PROHIBITION was moved for to the court of admiralty, upon an affidavit that the cause of action did not arise on the high sea.

But it was denied PER CURIAM, because sentence is passed ; and then no prohibition ought to be granted but for some cause apparent on the face of the record.

1. Com. Dig.

"Admiralty," (F. 9.). 6. Com. Dig. "Prohibition" (D.).

* [195]

Case 124.

The King against The Bail of Strudwick.

The Court will not estreat the recognizance of bail until the non-appearance of the principal be entered.

STRUDEWICK, who was the principal, gave a recognizance with bail, conditioned to keep the peace for a year, and afterwards to appear in this court on the first day of this * Term, which he did not.

IT WAS MOVED, that his recognizance might be estreated, so that the bail might be prosecuted.

1. Bar K. B.
76. 402.

IT WAS INSISTED for them by their Counsel, that this motion was irregular, because there was no default of *Strudwick's* appearance entered.

THE COURT was of opinion, that it was improper to offer anything against the bail until the default of the appearance of the principal was entered ; and if they had anything to offer, the time would be when a *seire facias* was sued out, and it could not then be done until the default of appearance as aforesaid was entered.

AFTERWARDS this default of appearance, &c. was entered ; and the recognizance being estreated, a *seire facias* was brought against the bail.

IT WAS INSISTED for them, that since the said recognizance was given, the defendant *Strudwick* had entered into another recognizance to appear and answer AN INFORMATION exhibited against him ;

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him ; upon which he was afterwards convicted, and committed to THE MARSHALSEA ; so that he being taken out of the custody of the bail by a legal process of this court, by that means they are discharged, and that he could not be brought up and rendered by them, because he was escaped out of gaol.

THE KING
against
THE BAIL, OR
STREDWICK.

There was no *committitur* of the principal entered ; and if, for that reason, the Court should be of opinion that the bail were not discharged,

IT WAS MOVED, that then the proceedings upon the *scire facias* might be stayed till the common day of *espleats*, because the bail might have an opportunity of re-taking him within that time.

THE CHIEF JUSTICE held, that where a man is admitted to bail, he is, by intendment of law, in their custody ; but when he is taken from them by the process of this court, then they are discharged.

ALL THE OTHER JUDGES were of a contrary opinion, *viz.* that they are not discharged until the *committitur* of the principal is entered ; for though he was committed upon the conviction on the information, he was as much in the power of his bail as if he had been at large, or still in their custody ; for upon a motion in this court, they might have him brought up at any time, and rendered back again in discharge of themselves.

Afterwards, upon another day,

IT WAS MOVED, that the *committitur* of the principal might be entered, so as the bail might take advantage thereof, and that the proceedings on the *scire facias* might be stayed in the mean time.

* THE COURT would not stay the proceedings on the *scire facias*, but ordered that a *committitur* should be entered on the right recognizance ; for there being two, *viz.* one for *the peace* and *the appearance* of the principal, which was forfeited for his not appearing, and the other for his appearance to answer the information, upon which he was afterwards convicted, the *committitur* must be entered on the last recognizance.

* [196]

Parr against Purbeck.

Case 125.

IN AN ACTION OF COVENANT for non-payment of rent reserved upon a lease for years, there was judgment against the defendant by default ; and upon a writ of enquiry executed, the jury gave the plaintiff but one shilling damages, and no more, though he proved that the defendant owed him one hundred and fifty pounds for rent.

If, in executing a writ of enquiry in an action of covenant for non-payment of rent reserved on a lease, the jury give less than the

rent in arrear, the Court will quash the inquisition, and grant a new writ of enquiry on payment of costs. —S. C. post. 213. 2. Leon. 214. 3. Leon. 177. Barues, 230. 448. Stra. 425. 515. 5. Com. Dig. "Pleader" (Z. 5.).

The

The reason why the jury gave a shilling and no more was, because the defendant took this lease of the plaintiff of a certain piece of ground, in which he (the lessee) covenanted to pay so much rent ; and the lessor covenanted, that he should have such a sewer or dam to keep water, he (the lessee) intending to set up a paper-mill, but the commissioners of sewers had made the water-course so narrow, that he could not have water sufficient for his purpose ; and being unwilling to sue the lessor upon this covenant, he left the land to the lessor ; and thereupon another person entered, and was possessed thereof, and set up a corn-mill, and the miller paid the rent ; and all this being known to the jury, who were of the neighbourhood, they gave the plaintiff a shilling, and no more.

And now IT WAS MOVED to set aside this writ of enquiry for the smallness of the damages ; for since this action of covenant was brought, and the breach assigned for non-payment of so much rent in certain, the jury were obliged to find the whole. It is true, if it had been in an action for damages, they might have found part only ; and it is usual to set aside a writ of enquiry for smallness of damages, where no manner of evidence is given why they should be mitigated (a) ; which is this case.

[197] THE COUNSEL for the defendant insisted, that the execution of a writ of enquiry is not to be set aside, and a new writ of enquiry granted, for the smallness of damages given * by the first jury, unless there be some contrivance or sinister management ; and so is the case in *Salkeld Rep.* 647. In covenant to pay a sum certain, as in the principal case, and that upon default of payment it should be lawful for the covenantee to enter and take the profits, &c. the defendant pleaded in bar, that the plaintiff did enter and take the profits ; and upon a demurrer to this plea, the plaintiff had judgment, and a writ of enquiry, and small damages ; and upon a motion, a new writ of enquiry was awarded, because an action of debt might have been brought upon this covenant, it being to pay a certain sum, and in such action the jury upon a writ of enquiry must have given the whole sum, unless the defendant proves something in mitigation, which was not done in that case ; therefore the Court looking upon it to be a contrivance of the jury, awarded a new writ of enquiry ; yet they held it to be a common rule, that no new writ of inquiry shall be granted for too small damages, if there was no contrivance in the case ; for if it should, this inconveniency might follow, viz. the small damages given by the first jury might influence the second jury to give greater.

THE COURT was of opinion to set aside this writ of enquiry ; for though the supposed breach of covenant, on the plaintiff's side, was true, viz. that the defendant had not sufficient water to set up his paper-mill, and that had been given in evidence to the jury on

(a) See *Parr v. Niblett*, post. 213.

the writ of enquiry, yet they could not have mitigated the damages on that account, much less when it was not given in evidence. It is true, the l-ffee left the land for that reason, and another entered and possessed it, which entry, &c. might have been given in evidence upon the trial of an issue joined, but not to a jury upon a writ of enquiry after a judgment by *nil debet*; neither did the defendant give it in evidence to the jury, but pretends they knew it themselves. It is admitted, that in covenant where damages are to be recovered, the jury upon a writ of enquiry are the proper judges of the *quantum* of the damages; and for that reason the Court will not set aside their inquiry, where they give small damages; but it is otherwise where the covenant is for payment of money, and the sum is ascertained, because in such case the sum being certain, the jury cannot lessen the damages; and this is the constant difference in such cases; and it is the same as if an *assumpsit* had been * brought for money upon a note under hand, for there the jury cannot mitigate the damages; if they do, the Court will set their verdict aside.

[198

And so it was done in the principal case upon payment of costs, &c.

Anonymous.

Case 126

THE PLAINTIFF brought an action in the court of common pleas, and laid four counts in his declaration. The defendant demurred to one of them, and the plaintiff joined in demurrer, and had judgment, and then he entered a *nolle prosequi* as to the other three, but without any *misericordia*; which the defendant believing to be erroneous, he brought a writ of error in the court of king's bench, and assigned this matter, there being a precedent in *Coke's Entries*, that it is erroneous (a).

IT WAS ARGUED in support of this judgment, that by the statute of *Jeofailes*, 16. & 17. Car. 2. c. 8. "no judgment after verdict, &c. shall be reversed for want of a *misericordia*;" and by the statute 4. & 5. Anne, c. 16. for the amendment of the law, it is enacted, "that no judgment shall be reversed, or writ of enquiry of damages stayed or reversed, by reason of any matter which would have been aided by any statute of *Jeofailes* in case of a verdict, so as an original writ, or bill or warrant of attorney is filed." Now the want of a *misericordia* is matter which is aided by the said statute of *Jeofailes* in case of a verdict; and therefore it is within the aforesaid act made for the amendment of the law; and the judgment is not to be reversed where that word is omitted.

THE COURT. If the entry of a *misericordia* had been necessary at common law, there is no statute of *Jeofailes* which cures the want of such entry; for those statutes extend to judgments entered "by confession, *nil dicit*, or *non sum informatus*;" but the principal

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judgment is neither of these, for it is a judgment upon a demurrer joined. Now at common law there was no need of entering a *miser cordia* in such cases, because such entry is only *pro falsa clamore*; and here is no colour of any false complaint, because the plaintiff says, *non vult ulterius prosequi*; and as for that case in *Coke's Entries*, many of them have been condemned.

So the judgment was affirmed.

[199]

Case 127.

* Clarke against Cornish.

Wednesday, 26 November 1723.

scire facias,
ought against
bail jointly,
a several
judgment a-
gainst each of
them.

TWO PERSONS entered jointly and severally into a recognizance of four thousand pounds bail for another; and afterwards the plaintiff brought a *scire facias* against both of them jointly, and had two *nibils* returned; on which plaintiff prayed execution against each for the whole debt, which was awarded accordingly.

Id. 339.

IT WAS NOW OBJECTED, that execution ought not to be awarded against each for the whole debt, because a several judgment cannot be given upon a joint *scire facias*, no more than upon a bond.

It is true, a recognizance may be joint and several (as this was), and such a recognizance may warrant a joint and several *scire facias*; but yet a several judgment can never be had upon a joint *scire facias* against each of the cognizors; for the plaintiff might have brought a *scire facias* against each of them separately, and not against both jointly.

THE COURT was of opinion, that this was the constant form, and so the judgment was affirmed; for if the award of the execution be joint, yet the plaintiff may have several executions; and though the *scire facias* is joint against both, yet the execution may be several; for as the recognizance is joint and several, to compel the plaintiff to bring two *scire facias* would be only to multiply actions.

Case 128.

King and his Wife against Basingham.

the wife
not be
in the
with her
and.

AN ACTION ON THE CASE, &c. was brought in the common pleas by husband and wife, in which the husband declared upon several counts, and one of them was for money lent to the defendant by him and his wife, by his consent, and promise made to them both.

Id. 341.

Upon *non assumpsit* pleaded the plaintiff had a verdict.

Id. 259.

Id. 161.

Id. 443.

1. Stra. 61. 229. 2. Stra. 726. 977. 1. Bac. Abr. "Baron and Feme" (K.).

IT

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IT WAS MOVED *in arrest of judgment*, that the declaration was ill, because the wife was joined in this action with her husband, which she ought not to be; and that the joining her in the action being matter of substance, was not helped by this verdict; for by this means, if the husband should die, then what is recovered would survive to her, when it ought to go to the executor of the husband.

KING
AND HIS WIFE
against
BASINGHAM.

But the judgment was affirmed.

A WRIT OF ERROR being brought in the court of king's bench, the same objection was made there; and that this action was founded on a contract made by the wife, when by law she cannot make any contract during the coverture. Sid. 346.

LEE *excepted to the declaration*, that the money being alledged to be lent by husband and wife, must be presumed to be lent during coverture; and then the money is the husband's money only, for which he alone ought to have brought his action; for a wife can have no interest in money during coverture. Cro. Jac. 644.

* IT WAS ARGUED *in support of the action*, that this objection came too late, it being after a verdict; and that it ought to be made good, if by any construction it might; therefore it shall be intended that the husband and wife were joint traders, and that she lent the money to the defendant before marriage. Besides, where a promise is made to the wife, if the husband bring an action for himself and his wife, he makes that promise good by his own consent. [200]

THE CHIEF JUSTICE. If the money was lent during coverture, the declaration is false, because then the wife could have no money. Cro. Eliz. 61.
Cro. Jac. 77.
205.
Roll. Abr. 32.
Sid. 25.
2. Sid. 128.
Allen, 36.
2. Mod. 217.

Adjournatur (a).

(a) This case was argued a second time in Trinity Term, 10. Geo. 1. on Saturday, 20 June 1724. NOTE to former edition. And in Hilary Term, 11. Geo. 1. it was argued a third time, when the Court inclined against the plaintiff, S. C. post. 341.

The Parish of Wrotham against The Parish of St. Olave. Case 179

JOHN RICHARDS, his wife, and five children, were removed by an order of two justices from the parish of *Capell* to the parish of *Wrotham*, in *Kent*, that being adjudged to be the last place of their legal settlement. Afterwards, upon an appeal to the next quarter-sessions, that order was quashed; and thereupon the poor man and his family came back to the parish of *Capell*, and by another order were again removed to *Wrotham*. This order, being removed into the court of king's bench by *certiorari*, was, by the consent of both parties, referred to the Judge of assize, who, upon hearing the evidence on both sides, directed, that the matter should Attachment against parish officers, for contrivance settling a poor man and his family.

THE PARISH
OF ST. OLAVE.

should be tried upon a feigned issue, which was done accordingly at the next assizes; and the parish of *Wrotham* had a verdict, and so both the former orders were quashed. But the parish of *Capell* being dissatisfied with this verdict, procured the parish-officers of *St. Olave*, in *Southwark*, to permit this man and his family to dwell in a tenement there, on purpose that they might remove him to *Wrotham*. Accordingly they came into the parish of *St. Olave*, and lived there some time, and were afterwards removed from thence by an order of two justices to *Wrotham*, which order was confirmed upon an appeal to the next sessions; so that by this means the parish of *Capell* was discharged of him, because * an order confirmed upon an appeal makes a good settlement in that parish by whom the appeal is brought, against all other parishes whatsoever.

[201]

It was now moved, that this last order might be quashed, and for an attachment against the churchwardens, &c. of *Capell*, for this contrivance.

BUT THE COURT would not quash the order, but made a rule for them to shew cause on such a day why an attachment should not go; and probably when they come to shew cause, they may consent to have the orders quashed; but they shewed no cause, and so the rule was made absolute.

Case 130.

The King against Jones.

dict given
an infor-
tion in nature
quo warranto,
whether it may
set aside; all

Judges of
and equally
ded.

ante, 166.

post. 291.

2. Stra.

3. Bro.

428.

THIS was an information in nature of a *quo warranto* against *Jones* and *Powell*, for pretending to be burgesses of *Brecknock*, in *Wales*, and to shew by what authority they claimed to be burgesses, &c.

Upon not guilty pleaded, the cause came on to trial at the assizes in *Hereford*; and upon hearing the evidence, the Counsel for the king desired that the matter might be found specially, for that it appeared by the charter of this corporation that the burgesses, and all other officers thereof, should be chosen *de inhabitantibus*, and that the defendants *Jones* and *Powell* were not inhabitants of *Brecknock*.

But there being evidence given, that the usage had been against the charter, the jury gave a general verdict upon the usage, viz. that the defendants were not guilty.

And now it was moved to set aside this verdict, for two reasons:

FIRST, Because it was given against evidence.

SECONDLY, Because the jury refused to find a special verdict which they ought to have done when it was required.

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And because of the difficulty of the case, this question was referred to ALL THE JUDGES OF ENGLAND (a), Whether a verdict by which the defendant is found "not guilty" on an information in nature of a *quo warranto*, could be set aside, and a new trial granted.

THE KING
against
JONES.

And THE JUDGES were equally divided, two against two in each court, so that not one Court was unanimous in opinion of either side ; but six of them were of opinion, that the verdict might be set aside, and six were of a contrary opinion.

* And it being now moved again to set aside this verdict for * [202] the reasons before-mentioned,

THE COURT was of opinion, that since this was become a question, Whether it could be done, or not ? it ought to be determined ; that it was certain a verdict in a criminal case could not be set aside for finding against evidence ; but then the question will be, Whether this case is criminal ? And as to the other reason for setting aside this verdict, which is, that the jury refused to find the matter specially, there seems to be some colour in it ; for upon such refusal, even a verdict given by a special jury, and upon a trial at bar, hath been set aside ; and certainly it will not be denied, but that a misdemeanor of a jury will avoid their verdict ; and it is a misdemeanor in them to refuse the finding a special verdict when desired, because every man has as much right to have a point of law determined by the Judges as he has to have any matter of fact tried by a jury ; and it would be unreasonable, that it should be in the power of any jury to hinder the trial of matters in such a due method as the law prescribes ; therefore a rule was made, that the plaintiffs should shew cause why this verdict should not be set aside.

And upon another (b) day THE COUNSEL for the defendants offered the following reasons why this verdict ought not to be set aside, and a new trial granted.

FIRST, For that it was never yet determined, that any Court could set aside a verdict, or grant a new trial, where the defendant was acquitted in a *quo warranto* brought against him for usurping any franchise ; and an information in nature of a *quo warranto* is a criminal prosecution, in which prosecutions the Court will never set aside any verdict and grant a new trial. It was so adjudged in the case of *The King v. Read* (c), which was an information against the defendant for perjury, in giving false evidence at a trial of a cause in the court of king's bench ; he was acquitted upon the information ; and upon a motion for a new trial, upon an affidavit

(a) This reference was not made in the present case, but in the case of the Mayor of Salisbury.—NOTE to the former edition.

(b) The first account to be found of this case is in Hilary Term, 10. Geo.

towards the end of the Term, at which time the defendants came to shew cause.—NOTE to former edition.

(c) T. Ray. 34. 1. Lev. 9. 1. Sid. 149. 153.

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against
JONES.

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made that some material witnesses to prove the perjury were absent, it was not granted. The case of *The King v. Sir John Jackson* (a) went farther than any case of this nature, which was an action of trespass brought by the plaintiff *Jackson* against one *Primate*; and the plaintiff had a verdict; with which the defendant *Primate* being not satisfied, he indicted the witnesses * of the plaintiff for perjury; which being ready for trial, *Sir John Jackson* ordered his servants to beat and imprison those witnesses who were to prove the perjury, so that they could not be at the trial; and thereupon the defendants were acquitted. Now though all this matter appeared to the Court, upon a motion for a new trial it was not granted, because it was in a criminal case in which the parties were acquitted; but an information was ordered against *Jackson*, who was convicted and fined. And this is likewise a criminal prosecution in the very nature of it. It is true, by the statute of 9. *Anne*, c. 20. a man is admitted to try his private right in an information; the words of which statute are, "If any man shall
"usurp an office in a corporation, it shall be lawful for the proper
"officer of the king's bench court to exhibit an information
"against him in the nature of a *quo warranto*, at the relation
"of any person desiring to prosecute, who shall be mentioned in
"such information as relator against such usurper, and to proceed
"as usual, &c." And though by that statute an information has the quality of a civil action, viz. if the defendant shall be found guilty, he shall pay costs; and so likewise shall THE RELATOR, if judgment be given against him; yet still the prosecution is for an offence of a mixed nature, and the civil part cannot be tried without the trial of the criminal part; and there is no difference between an information in the nature of a *quo warranto* and an information merely criminal as to the setting aside a verdict in either. And hitherto such informations have been accounted criminal prosecutions, and that by the plain opinion of the Legislature; for it is well known, that actions *qui tam*, &c. informations, and indictments, are excepted out of the statute of *Jeofailes*; and the reason is, because those are all criminal prosecutions, and for that reason they would not have extended to informations in nature of a *quo warranto*; and therefore it was expressly provided by the Legislature, that all statutes of *Jeofailes* shall extend to such informations.

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It is true, upon the first motion of this matter in court, there were some other reasons offered for setting aside this verdict, for some other misdemeanor of the jury, viz. that after one of them was sworn, and had heard part of the evidence for the prosecutor, he went out of the hall to make water, and was absent about two minutes (b), and but ten or fifteen yards distant; and that when they all withdrew * to consider of a verdict, and could not agree, they all consented to poll, and to find for that side on which the majority should fall, and that seven polled for the defendant; and thereupon they found a verdict for him.

(a) 1. Lev. 124.

(b) As the juryman himself swears by affidavit.

Now as to this matter, it is of no weight to set aside this verdict; it was not so much as mentioned when the verdict was brought in, nor was any exception made by the Judge (who tried the cause) to any of the jury who were impanelled to try the like issue the next day, between *The King v. Powell*.

The chiefest reason for setting aside this verdict was, that it was given against evidence, and their refusal to find a special verdict when required; for it being expressly provided by their charter, that the burgesses of this corporation should be chosen *de inhabitantibus*, but the usage being contrary, they gave a general verdict upon the usage, when they ought to have found the matter specially.

Now in answer to the first reason, it is the constant rule never to set aside a verdict for being against evidence, unless it was insisted to be so at the trial, especially after a defendant is acquitted; and then as to the other reason, *viz.* their finding against the express provision of their charter, when they ought to have found that matter specially, they might have cured it by special pleading, if they had thought it proper so to do.

But this is not a finding against their charter, because those persons who lived within such precincts, and had usually been chosen burgesses, and exercised other offices in that corporation, may properly be said to be inhabitants thereof within the meaning of this charter; therefore this Court, without some extraordinary inducement or great inconveniency shewn, will not make a precedent to take away the plea of *autrefois acquit* from the subject, which is a fence allowed by the common law against the insults of power.

ON THE OTHER SIDE it was argued, to set aside this verdict, that an information in nature of a *quo warranto* was not a criminal, but a civil prosecution. It is true, the statute 9. Anne, c. 20. is, "That if the defendant be found guilty of an usurpation, the Court may fine him;" but that does not make it a criminal prosecution, because the fine is only a consequence, that the right was not in the person who is to pay it; for the right is the only thing, and probably for that reason the Counsel on the other side did not so much as mention the fine.

* That which was now principally insisted on was, the finding * [205] against the express words of the charter, which appoints that the burgesses shall be chosen *de inhabitantibus* of the corporation, when the defendants were not inhabitants thereof. It is true, the charter confirms the usages there, but it cannot confirm such usages which are against the express words of the charter itself.

So that the question is, Whether persons who are not inhabitants of the corporation could be good burgesses thereof by usage? which ought to have been found specially, because the usage being inconsistent with the charter, must for that reason be quite destroyed, as in the case of *The King v. Philips*, where there were two charters, and the last contrary to the first, it was resolved that the first was merged in the last.

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So in the principal case, though it had been an ancient usage to choose burgesses not dwelling in that corporation, yet such usage must be merged in the charter, for that abrogates all the usages and customs which are inconsistent with the charter; and therefore they can never submit against it.

As to the misdemeanor of a jurymen, it is true, if he eat or drink whilst the verdict is under consideration, he may be punished, but that does not make it void; though it is otherwise if he absent himself, because he cannot hear all the evidence, so as to be rightly informed of the whole; for no man knows what part of an argument, or what sort of evidence, may convince him; therefore he ought to hear the whole, because one part may either strengthen or weaken the other.

Besides, the polling by the jury is like the flip of cross and pile, if cross for the plaintiff, if pile for the defendant; and certainly where verdicts are given by the majority of the poll, they cannot be given upon due consideration of the cause; therefore if there was nothing else in the case, that is a sufficient reason to set aside this verdict; but it could not be objected at the trial, because this misdemeanor was not then known.

[206] As for the case of *Sir John Jackson*, who ordered his servants to beat and imprison *Primate's* witnesses, because they should not be at a trial to prove *Sir John's* witnesses guilty of perjury, and thereupon those witnesses were acquitted, and no new trial was granted; it is true, this is reported in *Lewins*, but there is no clear reason to support the judgment given in that case; it is no more than for a man to be discharged of one crime by committing another; for the * defendants in that case were acquitted of perjury by beating and imprisoning the witnesses who were to prove it at a trial ready to come on, and no new trial was granted, because it was in a criminal case; but admitting it to be so in a case merely criminal, it is not so in an information in nature of a *quo warranto*; for if it should, it would be of the utmost ill consequence to all corporations, and it might endanger our very Constitution.

But it is not a settled rule, that a new trial cannot be granted in a criminal case, where the defendant hath been acquitted; for if the acquittal was upon a trial without due notice, certainly a new trial might be granted; and the rather, because no bill of exceptions will lie where the crown is concerned in the prosecution.

THE COURT first answered the objections, and said, As to the misbehaviour of the jurymen, who was absent for two minutes, it was not punishable; but if it was, it shall not avoid the verdict; and as for their polling and giving a verdict where the majority fell, *per PRATT, Chief Justice*, it is not like the case of the flip for a shilling, if cross for the plaintiff, if pile for the defendant; because that was a verdict which depended merely on chance; but the polling

(a) FORTESCUE, *Justice*, was of a contrary opinion, and said, polling was little better than chance; that it was against the design of the institution of

juries; and it was like the case of cross and pile; for the jury should convince one another by good reasoning.

ling was only giving credit and weight to the authority of the greater number of the jury.

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against
JONES.

As to the objection, that the jury should have found a special, and not a general verdict upon the usages, it doth not appear that the Judge who tried the cause directed them to find the matter specially; for he might think that there being no negative words in the charter to exclude their ancient usages, that such customs and usages which they had before the charter did still subsist; so that this discharges them from the imputation of finding against the direction of the Judge; but if he had directed them to find the matter specially, in such case they ought to find it so, because every subject hath a right to have a point of law determined by the Court, and not to have it huddled up in a general verdict by a country jury.

* The objection which goes to the whole is, that a new trial cannot be granted in a criminal cause where the defendant is acquitted: now, whether it may be granted, or not, is a question fit to be considered. It is true, it is generally held that it cannot; and so it was adjudged in *Sir John Jackson's Case* (a); but that is a very extraordinary case, for it is inconsistent with reason not to grant a new trial where a man is acquitted by his own artifice of a crime not capital; for it is (as hath been observed), that where a man hath committed one crime, he shall have it in his power to avoid justice by committing another.

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But admitting that case to be law, then the question will be, Whether a prosecution by an information in nature of a *que warrant* is a criminal cause, or not? upon which question the Judges of *England* have been equally divided.

PRATT, *Chief Justice*. If this is not to be looked on as a criminal prosecution, I should readily grant a new trial. This lately hath been made a question, and was referred to all the Judges, who were equally divided in opinion, five against six, and each Court was also divided: I was for a new trial (b).

FORTESCUE, *Justice*. I was against a new trial, and am so still. Indictments are sometimes used only for trying a right, and yet it was never pretended to grant a new trial in them. It is objected, that this is a mixed sort of a prosecution, and not entirely criminal: if so, still it is criminal. It is objected, that the fine imposed is always small, but it may be large.

RAYMOND, *Justice*. These informations are only methods to try the right, and ought to be looked on as civil actions; and though a fine is imposed, yet that makes no difference; for sometimes in actions confessedly of a civil nature a fine is set, as in actions of trespass *vi et armis*. This is my present opinion; but I would advise

THE COURT was of opinion, that the verdict was against law; for the charter is to be understood negatively *ac inhabitantibus*,

(a)

(b) Rex v. Barnett, 21. Viner Abr. 480. pl. 17.

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against
JONES.

and so destroys the usage; and where a jury bring in a verdict against law, agreeable or not agreeable to the direction of the Judge, the verdict ought to be set aside.

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* But afterwards, on the last day of *Hilary Term* following, THE CHIEF JUSTICE declared, that it was the opinion of THE WHOLE COURT to grant a *new trial*, if it could be granted by law; but it being a point wherein the Judges had so much differed, it ought to be well considered, because it affected all the corporations in *England*; and that it was never yet known, that a verdict was set aside by which the defendant was acquitted in any case whatsoever upon a criminal prosecution.

Case 131.

Turner against Turner.

S. C. Caf. Ch. n.
49.
Stra. 708.
Sel. Caf. in
Chan. 49.
2 Wil. Rep.
297.
2. Eq. Caf. Abr.
238. pl. 18.

THIS was a trial at bar, upon a feigned issue directed out of the court of chancery.

The only question was, Whether *David Turner*, the grandfather both of the plaintiff and of the defendant, had cancelled a will made by him in the year 1716, or not?

The case was thus: *David Turner* being seised of *gavelkind* lands in *Kent*, to the value of four hundred pounds, had issue *George Turner*, his eldest son, by one venter, and *David Turner*, his youngest son, by another venter; both of which sons died in the life-time of their father, *David Turner*, the testator. *George*, the eldest son by the first venter, left issue the now plaintiff; and *David*, the eldest son by the second venter, left issue the defendant; and *David Turner*, their grandfather, in the year 1716, made a will in favour of *George*, his eldest son by his first venter, which, as was insisted on by the plaintiff, was not cancelled by the testator in his life-time, but by the now defendant after the death of the said testator, that the estate might equally descend between them.

But upon full proof that the testator cancelled his will in his life-time, and said, that he intended his estate should equally descend and come to both his grandchildren, the defendant had a verdict.

* [209]

Case 132.

The King against Burchet and his Attorney, and the Town-Clerk of Guildford.

An attachment
lies for replevying
goods distrained
under a conviction
on a penal statute.

S. C. 1. Stra.
567.

BURCHET was convicted by a justice of peace for keeping dogs, nets, and ferrets, to catch conies, not being qualified, &c. and by a warrant from the said justice, * his goods were distrained for the forfeiture; and whilst they were in the possession of the constable, and before they were sold, the town-clerk granted a *replevin* to take them from the constable.

IT WAS MOVED to set the *replevin* aside, because goods thus taken by *distrains* on such convictions are irrepleviable, and for an attachment against the town-clerk.

THE

Michaelmas Term, 10. Geo. 1. In B. R.

THE COURT would not set aside the *replevin*, but made a rule to shew cause why an *attachment* should not go (a). THE KING
against
BURCHET,

The rule was afterwards discharged by EYRE, *Justice*, then AND OTHERS, alone upon the bench (b).

(a) Vide ante, 96.

(b) The reason of its being discharged was, because it was only a contempt to the inferior jurisdiction of the justices, in which case the court of king's bench never interposes, S. C. 1. Stra. 567. But in Easter Term, 16. Geo. 2. the court of king's bench granted an *attachment* against the under-sheriff of Cumberland, for granting a *replevin* of goods distrained on a conviction of deer-stealing, Rex v. Monkhouse, 2. Stra. 1184. So also for re-

plevying goods distrained for a fine imposed on an officer by commissioners of land-tax, Rex v. Oliver, Bunb. 14. And in another case, the Court, though they refused to grant an *attachment*, granted an *information* against the party for suing a *replevin* of goods distrained under the highway act, and refused it against the sheriff only, because it did not appear that he knew they were goods distrained under a justice's warrant, Rex v. Sheriff of Leicestershire, 1. Bar K. B. 110.

HILARY TERM,

The Tenth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt.

} *Justices.*

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

The King *against* The Mayor of Kingston upon Hull. Case 133.

UPON A MOTION last Term, a rule was made, that a *mandamus* should go to THE MAYOR OF KINGSTON, to assemble and keep courts, and to do the office of that corporation.

In drawing up the writ, the clerk added these words, "and to admit all those to their freedom who have a right to be free of that corporation."

IT WAS NOW MOVED to set aside this rule, because all who have a right to be free cannot be joined in one *mandamus*, as it was resolved in the case of the nine common-council-men of *Chester*, in the sixth year of *William the Third*, because every one hath a separate right; therefore two, or more, could not be * joined in this writ; for where several are joined, there can be no traverse taken, because no one is party to it.

Several persons cannot be joined in one *mandamus* to a MAYOR to admit them to their freedoms, for each has a distinct and different right.

S. C. 1. Stra.
578.
1. Salk. 433.
436.
5. Mod. 11.

* [210]

THE COURT was of opinion, that the *mandamus* was ill, and not warranted by the rule of the Court; therefore if it had been returned, it should have been *quashed*; but being not returned, it shall be *superfeded*, that THE MAYOR may not be obliged to make a return.

The

Case 134. The King *against* The Mayor of Whitchurch and Others.

Trial at bar denied.

A RULE was made against THE MAYOR and other officers of the borough of *Whitchurch*, to shew cause why AN INFORMATION should not go against them, being chosen into their respective offices, and not dwelling in the borough; and by a jury of non-residents being impanelled for that purpose, against which choice the inhabitants of this borough protested, it being contrary to their antient usage, as was now suggested.

THE COUNSEL for the defendants shewed for cause against this rule, that all the officers of this borough are to be constantly chosen by freeholders thereof; and that some of the inhabitants who were freeholders, were summoned to be of the jury, but they refused to appear, pretending they would not serve with those who were not inhabitants of the borough, but out-dwellers, and therefore excluded from being of the jury; and thereupon others were returned who would serve. That ever since the year 1641, the out-dwellers who had freeholds in the borough were returned jurymen, which appeared by the entries made in their borough-books, and such out-dwellers had served in all the offices thereof. That *Whitchurch* is an antient borough by prescription, and that the jury thus impanelled, as aforesaid, did not serve in a court-leet, but in a borough-court; for if it had been to serve in a leet, then it must be by inhabitants, but that in a borough-court none but freeholders are to be of the jury, which freeholders might be out-dwellers, so as they had a freehold within the borough. That all the jury had freeholds in the borough, and by such a jury assembled at a borough-court the defendants were lawfully chosen.

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But the rule was made absolute by TWO JUDGES against ONE, there being but three in court; for this being a matter of right, it was fit to be tried by a jury, who are the * proper judges of evidence.

THE COURT, at another day, was moved for a trial AT BAR upon some affidavits, that the freehold to the value of a thousand pounds might come in question.

But it was denied for no other reason, but that it was a borough cause.

Case 135. The Company of Musicians in London, }
OR } *against* Green,
The Chamberlain of London,

Debt upon a bye-law for exercising a trade, &c. the defendant being a musician, which is a science.—

A BYE-LAW was made in *London*, that no person but a free-man of that city should exercise any trade or art therein under such a penalty.

5. Co. 62. 3. Leon. 264. 1. Roll. Rep. 109.

Mr.

Hilary Term, 10. Geo. 1. In B. R.

Mr. Green not being free of the city of *London* played as musician at several city entertainments, particularly at the feast of the sons of the clergy, for which he was sued in the sheriff's court in *London*, for using the trade of a musician, not being free of the city; which cause was removed into this court by *habeas corpus*.

THE
COMPANY OF
MUSICIANS IN
LONDON, OR
THE CHAM-
BERLAIN OF
LONDON,
against
GREEN.

IT WAS INSISTED for him, that he was a musician, and attended with other masters in music at the feast of clergymen's sons, being employed by THE STEWARDS of the said feast; and because they did not likewise employ the city musicians, therefore they set up this prosecution against the defendant, and would now extend this bye-law to music, which is a *science*, and not a *trade*; and if this should be allowed, they may extend it to *lawyers* who are not freemen, and who attend the courts there, for the law is a science, and so is music: besides, it is improper to have the bye-laws of *London* tried in any of the courts of *London*.—The arguing of a lawyer is wind-music, and no handicraft trade.

IT WAS ARGUED for the plaintiff, that a *procedendo* should be granted, for that the commitment was good, and so was the bye-law; and that this court cannot try whether the case of the defendant *Green* is within this bye-law or not, because it is triable only in *London*, where the plaintiff must declare in a proper court, and on a special custom to make bye-laws, for otherwise all such laws might be controverted in this court.

THE COUNSEL for the defendant said, that the plaintiff's Counsel had touched very lightly upon the string; for that the profession of music was not within this bye-law, which extended only to handicraft trades; and that music was not a trade, but a science, in which science degrees were taken in all the universities in *Europe*.

THE COURT. Let there be a *consultation*, it being not proper to determine this question upon motion. The *customs of London* are always tried in their own courts: but if the Judge refuse, upon request, to let the fact be stated specially, we will set aside the verdict.

* And therefore a *procedendo* was granted, but with this direction, that the plaintiff should admit the matter to be found specially at the trial, otherwise the Court would not grant another *procedendo* in the like case.

* [212]

THE CAUSE was afterwards tried in *London*, and at the trial a difference was taken between exercising such handicrafts for lucre and gain (which was the defendant's case) and exercising them for diversion and amusement, and that the one was within the bye-law, and the other not.

And thereupon the plaintiff had a verdict and judgment, and afterwards the defendant took up his freedom, and acquiesced.

Morse

Case 136.

Morse against Sury.

Award, where
good.

AN ACTION OF DEBT upon a bond for performance of an award where the submission was "of all actions, &c. between the plaintiff and the defendant."

The defendant pleaded "*nullum arbitrium.*"

The plaintiff replied, and set forth *an award* made by the arbitrators on such a day "of all actions between the plaintiff and the defendant *and his wife,*" wherein they awarded, that the defendant and his wife should pay twenty pounds to the plaintiff on such a day, in full satisfaction of all law-charges due to him by the defendant's wife as executrix of one *Bodily* her first husband; and that both the plaintiff and the defendant should equally pay to the arbitrators the charges of making the award, and that they should execute mutual releases. The breach assigned was, that the defendant had not paid the twenty pounds on the day.

REEVE *for the defendant* excepted to the award :

FIRST, For that the submission being only of all differences between the plaintiff and defendant, the award that the defendant and his wife shall pay so much money to the plaintiff is ill, because no difference in which the wife is party is submitted to the arbitrators (*a*). If *A.* and *B.* submit to the arbitrament of *J. S.* of all suits and actions pending between them, the arbitrators cannot make an award of an action which *B.* and his wife have against *A.* (*b*), for that is out of the submission. In the case of *Barnardiston v. Fewler* (*c*), an award that all prosecutions should cease in all actions between *A.* and *B.* will not extend to suits where *A.* is plaintiff against *B.* and others defendants.

SECONDLY, The arbitrators have awarded money to be paid to themselves, which is illegal.

* [213]

* SIR CLEMENT WEARG, *Solicitor General, contra.*

FIRST, The case in *Roll's Abridgment* differs from this case; because there the wife had a demand of which she would have been barred without being made a party to the submission. There is a case in *Cre. Jac.* 447. in point, where a submission was of all demands betwixt plaintiff and defendant, and award that defendant pay, whereas it was a debt from the defendant's wife as executrix, and yet held good.

SECONDLY, That part is void, but yet the rest is good.

THE COURT was of the same opinion; wherefore judgment for the plaintiff.

(a) 1. Roll. Abr. 216. pl. 4.
(b)

(c) Hilary Term, 12. Ann. 10. Mod.
204. Gilbert's Cases, 125.

Parr *against* Niblètt.

Case 137.

AFTER a writ of inquiry was executed, it was set aside, because the jury gave too little damages; and a rule was made, that on payment of costs a new writ of inquiry might be executed, which was done, but without paying the costs.

A writ of inquiry may be set aside for insufficiency of damages.

IT WAS NOW MOVED, that this last writ of inquiry might likewise be set aside.

S. C. ante, Parr v. Purbeck.

And a rule being made for that purpose, unless cause shewed on such a day why it should not,

IT WAS NOW SHEWED for cause, that the plaintiff had done all in his power to get the costs taxed, but could not prevail; and that the defendant's attorney promised him, that he would take notice of executing this writ of inquiry, as if the costs had been already paid; therefore it was insisted, that upon payment of costs, the rule might be discharged.

IT WAS SAID *on the other side*, that this second writ of inquiry was to be executed upon payment of costs, and not otherwise; and that the costs not being paid, that writ could not be executed.

THE COURT ordered the attornies on both sides to attend THE MASTER of the office, and that the plaintiff should pay what costs THE MASTER should tax, and that upon payment thereof the rule for setting aside the writ of inquiry should be discharged.

* [214]

* The King *against* Mary Johnson.

Case 138.

UPON A MOTION for a *habeas corpus* to be directed to the defendant, to bring up the body of a child about ten years old into this court, which she, the defendant, unjustly kept from the guardian;

If a female child of nine years of age be brought into court on a *habeas corpus*, in

THE CASE was thus: This child remained under the care of Mrs. ———, an old acquaintance of the family, who had bred the child for some years past; her father died about six months past, and left the charge of this child to his own brother, J. Howland, the present guardian, and now to him, who is intitled to the estate, if the child should die without issue; so that he is not a proper person to be guardian. Besides, a *habeas corpus* is a writ for no other use but to set persons at liberty, and there is no reason why it should be granted in this case, because the rightful guardian has a proper action to recover the child. It is true, the Court *ex debito justitiæ* is to grant it, but the merits of the cause shall not be tried upon it.

the custody of her nurse, the Court will order her to be delivered to her testamentary guardian; for she is too young to judge whether she is or is not free or under restraint.

S. C. 2. Ld. Ray. 1333.

S. C. Stra. 579.

See Stra. 444. 982.

3 Peer Wm. 151. 3. Burr. 1436.

THE COURT doubted whether they could grant it or not, it being the business of the court of *Chancery* to restore children to their proper guardians.

This

THE KING
against
MARY JOHN-
SON.

This is not the first time that, upon a return of a *habeas corpus*, persons have been delivered by this Court to those who have a right to receive them; it was done by HOLR, *Chief Justice*, and in the *Lady Harriot Berkeley's Case* (a), upon the return of a *habeas corpus*, it being suggested that she was married; in the *Lady Rawlinson's Case* (b), who was detained by her husband against her will; both ladies the Court left to their own election, because they were both of discretion. And likewise in that case where the *Lord Anglesea* (c) devised his estate to his daughter, and appointed who should be her guardian, and expressly declared in his will, that if she lived with her mother, half her estate should be forfeited; yet this Court would not relieve: but she being brought up by *habeas corpus*, was left to her own choice, whether she would live with her mother, though by her living with her she was to forfeit half her estate.

* [215] * But in the principal case THE COURT would make no rule, because the guardian was not in court.

But on another day he came into court, and then the child was delivered to him without farther argument, though the child cried not to be delivered to her uncle: for the Court resolved that he must take her if he demands her; and ordered him so to do, and he did take her away out of court, with his own hands (d).

(a) 3. State Trials, 544.

(b) Ante, 22.

(c)

(d) The Court delivered the child to the guardian in the present case, because from her extreme youth she had no judgment of her own, 5. C. Stra. 579. for the Court in these cases is only bound to see that the party is not under an illegal restraint, *Rex v. Clarkson*, 1. Stra. 444. and in respect to delivering the party to any particular person, will judge upon the

circumstances of each particular case and give direction accordingly, *Catley's Case*, 3. Burr. 1437.; for the right of guardianship ought not to be determined in this summary way, either in the court of king's bench, *Rex v. Smith*, 2. Stra. 982. or by the court of chancery, *Ex parte Hopkins*, 3. Peer Wms. 152. unless, perhaps, in the case of a guardian appointed by the Court, *Eyre v. Shaftsbury*, 2. Peer Wms. 117, 118. *Goodall v. Harris*, 2. Peer Wms. 561.

Case 139.

Plunkett against Gillmore.

An action on the case lies for conspiring to cause a tavern to be reputed a bawdy-house.

S. C. Fort. 211.
2. Com. Dig.
"Action for
"Conspiracy"
(A.).

THIS was a special action on the case brought by the plaintiff in Ireland.

The declaration was, that he (the plaintiff) kept a TAVERN in Dublin, and that the defendant procured a soldier to dress himself in woman's clothes, and so to personate a woman, and then to come with another soldier to the house of the plaintiff, and to call for wine, and soon afterwards he (the defendant) procured another soldier to come into the room where the two were drinking, and to claim that soldier in woman's clothes to be his wife, and by this means to quarrel with the other, and to cry up THE TAVERN to be a bawdy-house, which brought the mob together, who were likely to break his (the plaintiff's) windows, and that there is a custom in Dublin to cart bawds.

Upon

Hilary Term, 10. Geo. 1. In B. R.

Upon the general issue pleaded, the plaintiff had a verdict and judgment in the king's bench court in *Ireland*; and a writ of error brought in this court.

PLUNKETT
against
GILLMORE.

IT WAS SAID *by the plaintiff in error's Counsel*, that it did not appear by the declaration, that the plaintiff had any cause of action, for he only set forth, that the mob were likely to break his windows, which is no positive allegation that they did break them, and therefore the judgment ought to be reversed.

But THE COURT, without any further argument, affirmed the judgment, for the declaration set forth a custom in *Dublin* for bawds to be carted; therefore to represent A TAVERN to be a *bawdy-house*, may be injurious to his trade as a vintner, by which he may be very much damaged, and by consequence has a good cause of action.

* [216]

The King *against* The Corporation of Penryn in Case 140. Cornwall.

UPON A MOTION for two informations in nature of *quo warranto* against two persons who pretended to be mayors of this corporation, and upon an affidavit, that * the mayor in possession was not duly elected by a majority of the capital burgesses, there were two rules made, that such informations should go against those two persons, unless each of them should shew some good cause to the contrary; which rules were afterwards made absolute against both the said persons.

If two informations *quo warranto* be filed, the first against the mayor *de facto*, and another against a burgess who voted for him, the second information shall be first tried.

Another motion for the like informations against two other persons, who pretended to be capital burgesses of the said corporation, but were not, for that one of them had not taken the oaths to the Government (a), and the other was removed from his office above two years last past, and yet both of them voted at the election of the mayor in possession, by whose votes he had a majority, was also made absolute.

1. Stra. 582.

The Counsel insisted that these two last informations might be first tried.

THE CHIEF JUSTICE was of opinion not to grant them, because at the trial of the right of the mayor, the not taking the oaths by one of the burgesses, and the removal of the other, might be given in evidence.

But the Counsel still insisted, that there might be an inconvenience in this matter; for if the Judge who shall try the right of the mayor should be of opinion, that those things could not be given in evidence at such trial, then the jury would certainly find against the right of one of the mayors; and it is probable, that though

(a) See the Statute 13. Car. 1 c. 1. Smith, 1. Term Rep. 573. and Rex v. Rex v. Williams, 1. Stra. 672. Rex v. Mowling, 3. Term Rep. 316

Hilary Term, 10. Geo. 1. In B. R.

THE KING
against
THE
CORPORATION
OF PENRYN IN
CORNWALL.

these two persons were not capital burgessees when the mayor was elected, for the reasons before-mentioned, yet they might have done some corporate acts as such, and so might be accounted capital burgessees *de facto*, and therefore their right as such may not be admitted to be litigated at the trial of the right of the mayor.

And of this opinion were THE OTHER JUDGES, *viz.* that at the trial of the elected, the right of the electors should not be inquired into or given in evidence (a); and therefore the most proper method was first to try the right of the electors upon an information in nature of a *quo warranto*, which ought to go against those two persons who pretended to be capital burgessees.

And thereupon it was granted to try their right first.

(a) The titles of persons who are *de facto* members of a corporation, cannot be impeached on the trial of a person elected by them, Cowp. 507. But where there is no other mode of trying the right

of the electors in the first instance, the Court will grant an information against the elected, Rex v. Mein, 3. Term Rep. 595.

* [217]

Case 141.

* Biggs against Greenfield and Bengier (a).

If trespass for taking and selling the plaintiff's goods be brought against two persons, and the one suffers judgment to go by default, and the other justifies *the taking* on a distress for rent by command of his co-defendant, and *the selling* by the licence of the plaintiff, and issue be taken on the licence and found for the defendant, the judgment suffered by default shall be arrested.

TRESPASS against two defendants, for *vi et armis* breaking and entering the plaintiff's house, and taking away and selling his goods, and for breaking and entering his close, taking his cattle, &c. and converting them to their own use.

Bengier, one of the defendants, suffered judgment to go by default.

Greenfield, the other defendant, pleaded as to the *vi et armis* "not guilty," and, as to the other trespasss, justified the entry and taking the cattle by distress for rent due and in arrear to Bengier, reserved upon a lease made by him to the now plaintiff, by command from Bengier, by licence of the plaintiff; and that he, the defendant Greenfield, sold the cattle which he had distrained for the rent, by the leave of the plaintiff himself, from whom the rent was due.

The plaintiff took issue upon his licence to sell, and the jury found for the defendant, *viz.* that he had leave to sell the cattle.

WEBB, Serjeant, moved in arrest of judgment for Bengier :

FIRST, That the verdict having found the issue on *the licence* for the other defendant, it appears upon the record that the plaintiff has no cause of action, and consequently he can have no judgment against any defendant. In an action of covenant (b) against two for not building a house, judgment passed against one by default, and the other pleaded performance, and it was found for

S.C. 2. Ld. Ray.

1372.

S. C. 1. Stra.

610.

2. Ld. Ray. 1080.

(a) This was in Mich. Term, 11. Geo. according to Ld. Ray. 1080 and per Green Strange.

(b) 1. Lev. 63.

him;

him; on which judgment was arrested, because it appears that there is no cause of action. In an action of trespass (a) against two for taking a gun; one justifies the taking for the preservation of the peace, and it was found for him; the other pleaded *not guilty*, and it was found for the plaintiff; and he had judgment, for the taking shall be intended at another time without cause; but otherwise where one defendant justifies by gift of the goods; for that shews the plaintiff can have no cause of action (b). If several commit a trespass, the same is joint or several at the will of him to whom the wrong is done, yet if he release to one of them, all are discharged (c). It must appear upon the record that the plaintiff has cause of action; and it will not be sufficient to say that it does not appear that he has no cause of action. The licence is the same as a release or a grant, for it equally destroys all cause of action.

BIGGS
against
GREENFIELD
AND BENDER.

SECONDLY, This plea is ill for another reason, viz. because it is not averred, that the lease upon which this rent * was reserved, and for which the distress was taken, is still subsisting, and not expired; for if it be, then the distress was unlawful.

* [218]

ON THE OTHER SIDE *it was argued*, that this justification was entire, and went to the whole trespass, for the entering and taking the cattle is justified by a distress for rent, which part of the plea was admitted on all sides to be good, and the conversion was answered by the licence which the jury had found; so that upon this record it does not appear, that the plaintiff had any cause of action, therefore the defendant must have judgment. It is true, the other side would distinguish this case from an action of debt or covenant; but yet where on the record itself it appears that the plaintiff in trespass had no cause of action, it is the same thing; and though it should be admitted, that this plea does not cover the whole action, yet the jury having given entire damages for the conversion as well as for the entry, the plaintiff can never have judgment on this record.

THE COURT. This case of a licence cannot be distinguished from a gift of goods, or a release, which destroys the cause of action as to all the defendants; wherefore let judgment be arrested as to both.

(a) Cro. Jac. 154.

(c) Co. Lit. 252. a.

(b) Year Book 7. Edw. 4. pl. 18.

3. Co. 52. S. Co. 120.

Mordant against Small.

Case 142.

ERROR OF A JUDGMENT given in the court of common pleas in an action of covenant brought by the plaintiff on a deed-poll.

If A. covenant to pay so much money on B. transferring so

much stock to him, or some other person, at the request of A. on or before such a day and at such a place, and to receive the stock at the said time and place; a declaration in covenant by B. must state a request to transfer; the fixed hours on which such transfers are made; and that he was at the place on the last instant of the time, ready to make the transfer. — Ante, 40. 65. 105. Post. 294.

MORDANT
against
SMALL.

The plaintiff in the action declared, that in and by the said deed, the defendant covenanted to pay fifteen thousand pounds on the plaintiff's transferring two hundred pounds *South Sea* stock to the defendant, or other person, at the request of the defendant, on or before the twenty-eighth day of *September*, and at such a place, at which time and place the defendant covenanted to receive the stock. The plaintiff then sets forth the custom of that Company to transfer the stock at the *South-Sea House*, in such a method and at such hours, and avers, that he was at the *South-Sea House*, &c. on the twenty-eighth day of *September*, *et paratus fuit et obtulit* then and there to transfer the stock, and stayed there from nine of the clock in the morning of that day, until three of the clock in the afternoon, and until the books were shut; and that the manner of transferring is by signing the name in the books of the Company, &c. but that the defendant, or any other person for him, was not there to receive or accept the said stock, and to pay the money, *ad damnum*, &c.

* [219] And upon a demurrer to this declaration, judgment was given in * the court of common pleas for the plaintiff.

LEIGH, *for the plaintiff in error*, now argued that the declaration was insufficient.

FIRST, The tender is ill, for it is not shewed which were the usual hours for transferring; so that it does not appear that the tender was made within the usual hours of transferring. In the case of *Colbourn v. Davies* (a) a tender was pleaded to be made *secundum usuales regulas et ordinationes in hujusmodi casu edit. et provis.* which the Court inclined to be ill, so that the plaintiff discontinued.

SECONDLY, The tender ought to have been made the last instant of the time.

THIRDLY, The plaintiff ought to have signed the transfer books; a *paratus fuit et obtulit* is not sufficient.

FOURTHLY, By the contract the defendant is left at liberty whether he will take the stock or not; for without his request he cannot be obliged to acceptance; and it not being averred that he made a request, no action lies.

REEVE *contra*.

FIRST, The plaintiff was at the *South-Sea House* to the shutting of the books; so that the particular hours for transferring were immaterial.

SECONDLY, If the plaintiff was there the whole time, he must have been there the last instant of the time.

THIRDLY, Signing the transfer is making an actual transfer, which is unnecessary where the defendant does not appear.

FOURTHLY,

Hilary Term, 10. Geo. 1. In B. R.

FOURTHLY, Such construction will overthrow the whole contract: "on the request of the defendant," being words repugnant, ought to be rejected.

MORDANT
against
SMALL.

PRATT, *Chief Justice*. Suppose the plaintiff made a tender at ten of the clock, then went away, and in the mean time the defendant came expecting the transfer, would that be a good tender? No certainly: therefore the plaintiff ought to have pleaded a tender the last instant when the defendant was bound to attend in order for an acceptance.

FORTESCUE, *Justice*.—FIRST, It ought to appear that the custom and usage was to transfer between the hours of nine and three. Such preciseness is not requisite in case of a common law tender, because every person is acquainted with the common-law; but the case is different where a tender is to be regulated by the usage and customs of a private corporation. I think it ought to have been averred what were the usual hours of transferring. This was one of the points adjudged in the case of *Lancashire v. Killingworth (a)*.

SECONDLY, The tender is alledged to be made on the 28th of September; so it may be concluded not to be made within the proper hours for transferring.

THIRDLY, There is no necessity to fill up the transfer: so resolved in the case of *Blackwell v. Nash (b)*, such transfer would be idle, if the party did not come to accept it. In the case of a covenant to execute a deed, the party must prepare the deed, get it ingrossed and sealed; but need not execute it, unless the covenantee be ready to accept it.

FOURTHLY, By the words of this contract the first act lies on the defendant, viz. to request the transfer.

RAYMOND, *Justice*. It is a foolish agreement leaving the defendant at liberty to proceed in the bargain or not; agreements are to be guided by the words; the tender, not being made at the last instant, seems ill.

Adjournatur (c).

(a) 2. Salk. 623. 3. Salk. 342. 12. Mod. 529. 1. Ld. Ray. 686. Comy. Rep. 116.

(b) Ante, 105. S. C. 1. Stra. 535.

(c) See *Warren v. Consett*, ante, 107. *Bullock v. Noke*, Stra. 579. *Duke of*

Rutland v. Hodgson, Stra. 777. *Thorn-ton v. Moulton*, Stra. 533. *Bowles v. Bridges*, 2. Stra. 832. *Clark v. Tyson*, 1. Stra. 504. *Menet v. Rane*, Stra. 458. *Rhodes v. Lovit*, Bunb. 70.

* [220]

* *Pocklington against Hatton.*

Case 143.

SIR THOMAS HATTON, the testator, made a will in favour of the defendant, and afterwards purchased more lands, and then he made a codicil, and disposed some part of his personal estate, but did not mention the purchased lands.

Cro. Car. 341.
Jones, 331.
7. Mod. 53. 64.
117.
Ld. Ray. 62.

Stra. 691. 1105. 1142. 3. Bac. Abr. "Bill of Exceptions" (A.).

POCKLINGTON
against
HATTON.

After the death of the testator, his heir at law, who was the lessor of the plaintiff, brought an ejectment; and THE JUDGE who tried the cause being of opinion for the plaintiff, the Counsel for the defendant tendered a *bill of exceptions*, which, as drawn up, and signed by the Counsel on both sides, the Judge refused to seal; and thereupon the jury, by his directions, found a general verdict for the plaintiff.

And now, upon an affidavit made of this matter, the Court was moved, that all the proceedings might be set aside, and that the plaintiff, if he thought fit, might bring a new ejectment, or, at least, that the Court would stay all farther proceedings in the cause, until the *bill of exceptions* was signed by the Judge.

IT WAS INSISTED *for the plaintiff*, that the judgment was signed, and the record removed by the defendant, who had brought a writ of error in THE EXCHEQUER-CHAMBER, so that the Court could not make any rule in this cause, and that the defendant made this motion for no other purpose than that the Court would allow him time to assign errors, because the Judge had refused to sign the *bill of exceptions*.

But since the plaintiff had a verdict and judgment, and the defendant was in possession, it was proposed that he should deliver up the possession to the plaintiff; and then, if the defendant thought himself wronged, he might be plaintiff in a new ejectment to recover the possession again.

It was objected against this proposal, that if the now defendant should deliver up the possession, and be made plaintiff in a new ejectment, there were several old terms still subsisting which might stand in his way, and that the writ of error in THE EXCHEQUER-CHAMBER was not yet returned, so that this cause was still under the controul of this court.

* [221] THE COURT was of opinion to grant a *new trial*, if the defendant had made this motion in time, viz. before* the judgment was signed, but not after, and much less after a writ of error brought in the exchequer-chamber.

And as to the staying the proceedings until the Judge who tried the cause should sign a *bill of exception*, that may be for ever, because he may never sign them.

PRATT, *Chief Justice*. It has been resolved in this court, in my Lord Chief Justice HOLT's time, that a Judge is not obliged to sign a *bill of exceptions*, unless offered at the trial, and drawn up according to the minutes then taken.

The defendant's Counsel, perceiving the opinion of the Court, offered to deliver up the possession to the plaintiff, so as he would enter into a rule of court not to set up any old terms for years, or incumbrances against the defendant's title, and that he would receive a declaration in ejectment immediately, and plead to issue, so

Hilary Term, 10. Geo. 1. In B. R.

as a trial might be made at the next assizes ; and if a verdict should be found against him, then to quit the possession within ten days after the trial ; to all which the now plaintiff agreed.

POCKLINGTON
against
HATTON.

And at the next assizes this ejectment was tried, and the jury found a verdict for the defendant, who was heir at law, and that to the satisfaction of the Judge who tried the cause.

In *Easter Term* following the plaintiff moved for a *new trial*, and to set aside the last verdict, because the jury found a *general verdict*, when it was required that they would find the matter *specialy*.

And accordingly it was set aside.

And in *Trinity Term* the Court was moved for a good jury, and that a *special verdict* might be found, which THE COURT thought necessary to determine the law in this matter.

And a rule was made for a good jury.

HILARY TERM,

The Tenth of George the First,

I N

The Common Pleas.

Sir Peter King, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*

Alexander Denton, *Esq.*

Robert Price, *Esq.*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Sir Clement Wearg, *Knt. Solicitor General.*

Wright *against* Horne.

* [222]

Case 144.

EJECTMENT.—A testator devised “all that my messuage
“ in *Edmonton* to *Francis Carter* and his heirs;” and “all
“ the rest and residue of my messuages, lands, tenements
“ and hereditaments in *Edmonton*, *Enfield*, and elsewhere, to *John*
“ *Lammas*, his heirs and assigns for ever.”

After the making of this will, *Francis Carter*, the devisee, died
in the life-time of the testator, so that this became a lapsed legacy
by his death.

The sole question was, Whether this latter clause of * the will
would carry over the lapsed legacy to *John Lammas*, the re-
siduary legatee, or whether it should descend to the heir at law of
the testator?

It was admitted that such a residuary clause would carry over
a lapsed legacy to a residuary legatee from an executor; but the
doubt was, whether it would carry it from the heir at law.

THOSE WHO ARGUED that it would not, cited many authorities
in the books, where it is expressly adjudged, that an heir at law
shall not be disinherited, but by very plain and clear words, or by
the testator.—12. Mod. 592. 1. Willf. 313. Cowp. 299.

WRIGHT
against
HORNE.

some necessary implication from express words, which shew that the testator did intend to disinherit him (a). Now, in the construction of wills, the courts of law always consider the intention of the testator, which they collect out of his words: as for instance, in the case of *Cranmer v. Webb* (b), upon the will of *Sir Henry Wood*, who devised, that if his daughter married *the Duke of Ec.* then his lands should be and remain to her and the heirs of her body; but that if she died without issue, then, after her death and the death of *the Duke*, they should be and remain to *Sir Caesar Cranmer, Ec.*; she died without issue, and *the Duke* survived, and *Sir Caesar* and *Mr. Webb* married her sisters; and it was adjudged, that they should take by moieties during *the Duke's* life. So where a man devised his estate to his eldest son, and to three more and their heirs, and that one of those three should have all the profits during life; and it being proved that the devise was only *in trust* for those three, it was adjudged (c), that they should release to the son, who was heir at law. So in *Chancey's Case* (d), in *February* last, where the testator, after a devise of several pecuniary legacies, added these words, "and all the rest of my goods and chattels, and estate whatsoever, I devise to my wife, &c." it was decreed, that the equity of redemption of a copyhold of inheritance (of him the testator) did not pass by that clause to the wife, but that it should go to the heir at law. And so it was where the testator devised lands held of such a manor to his wife for life, and likewise the services to her for fifteen years, and all the manor to *T. S.* after the death of the wife; it was adjudged (e), that the heir at law had a good title to the services after the fifteen years, and during the life of the wife. * There is a case in *Leonard* (f), where there seems to be a contrary resolution against the heir at law, but upon consideration thereof it will appear to be very different from the principal case: it was a devise of lands in *Gages*, for the erecting and maintaining a free-school, and a devise of other lands to *T. S.* and his heirs, and all his other lands to *T. French*, his heirs and assigns for ever; in this case it was adjudged, that the devise of the lands in *Gages* was void, because there was no person to take by that devise, but that it passed to *French* by those general words, "all other his lands to *French*," though the intention of the testator could not be collected out of the words of this will, that they should pass to him. Besides, this case stands singly by itself, and there is not another in all the books to support it; and upon due consideration had, there is some difference between that and the principal case; for in *French's Case*, the devise was void *ab initio*, but here it was good at the time of the making this will, and the testator himself, without a prophetick spirit, could not know but that it would be good at the time of his death. If

* [223]

(a) Lane, 57. Raym. 453. T. Jones, 107. 114. Cro. Car. 158. 369. 447. Cro. Eliz. 742. Dyer, 371. 12. Mod. 596. 2. Vern. 571. Prec. Chan. 384. And see *Denn v. Gaskin*, Cowp. 661.

(b) Show. Parl. Cas. 87. 2. Vern. 371.

(c) Fitz. Abr. "Devise" 22.

(d) The case of *Wells v. Edwards*.

(e) Moor, 7. Roll. Abr. 844.

(f) *Bennet v. French*, 1. Leon. 251.

it should be objected, that these lands may pass to *Lammas* by way of executory devise, upon the contingency that *Carter* might die in the life-time of the testator, which he might very well intend, without a prophetick spirit; the answer is, that for estates to pass by executory devise, is only an indulgence allowed by the law, where otherwise the words of the will would be void, which is not applicable to the present case; because there are other lands mentioned in this will sufficient to satisfy the words. Neither are these cases (*a*), where it appears on the face of the will, that the testator had lands to dispose at the time the will was made, applicable to this case, because here the testator had not these lands to dispose at the time of making his will; for the words "all the rest and residue of his lands to *John Lammas*," are exclusive, and shall only pass those lands which were not before devised; but the lands now in question were before devised to *Carter*; and he being dead in the life-time of the testator, it is impossible for him to take by this devise, therefore they shall descend to the heir at law.

WRIGHT
against
HOBBS.

Allen, 28.
2. Vent. 285.
1. Lev.
Salk. 239. pl. 48.

IT WAS ARGUED for *John Lammas*, the residuary legatee, that by the devise of "all the rest and residue of his lands to him and "his heirs," those very lands which were devised * to *Carter*, and which by his death in the life-time of the testator became a lapsed legacy, were legally vested in the said *Lammas*; so it seems plain, that all the rest and residue of his estate, which the testator had at the time of making his will, did pass to him by those words; and why should not that estate, which by possibility he might have in his life-time, pass to the said *Lammas* by way of executory devise, upon a contingency that *Carter* might die (as he did) in the life-time of the testator, especially since by the devise to *Carter*, the heir at law was disinherited. It is like that case, where the testator devised his lands to two and their heirs, and one of them afterwards died, living the said testator, the other shall have the whole, though by the words of the will the testator intended him only a moiety, but he shall have the other moiety before the heir at law, because it is very plain the testator intended to pass all his estate from him. So where the devise was to *T. S.* and his heirs, "and if he died "without issue, then to *M. H.* in fee, and afterwards *T. S.* died in the life-time of the testator, but left issue; adjudged (*b*), this was a lapsed legacy as to *T. S.* and that the lands should pass to *M. H.* and not to the issue of *T. S.* because such issue could not take by this devise. Now in the principal case, the testator intended that *Lammas* should take what he had not before devised to *Carter*; and his intention is clear without any spirit of prophecy, that if *Carter* had lived, the heir at law had been effectually disinherited; therefore these general words, "all the rest and residue "of my lands to *Lammas*," being sufficient to pass them to him, and agreeable to the intention of the testator himself, they must

* [224]

(a) Allen, 28. 2. Vent. 285. 1. (b) Cro. Eliz. 423.
Salk. 239.

WRIGHT
against
HORNEL.

necessarily pass to him. As to that case between *Wells v. Edwards* (a), it is no authority against that construction which hath been made in the principal case, because in that case the will began with pecuniary legacies, which shews that the testator did not intend to pass the equity of redemption of a mortgage of a copyhold of inheritance to his wife, and for that reason it went to the heir at law.

THE COURT were of different opinions, there being no case in all the books which comes near it, except that in *Leonard's Reports* (b), which ought to be well considered.

* [225] THE CHIEF JUSTICE was of opinion for the heir at law against the residuary legatee; because these words, * "all the rest and residue of my lands to *John Lammes*," were exclusive of the lands devised to *Carter*; so that by his death in the life time of the testator, the legacy to him being lapsed, those lands must descend to the heir at law.

ANOTHER JUDGE was of a contrary opinion, viz. that it seemed very clear to him, that the testator intended to disinherit the heir.

THE CHIEF JUSTICE likewise agreed in this opinion, as to the lands devised to *Carter*; but that it does not follow, that because he had disinherited him of the lands in relation to *Carter*, therefore he intended to disinherit him of those lands which he had devised to *Lammes*; so that this matter is fit to be considered.

And so it was adjourned (c).

(a) Ante, 222, 223.

(b) 1. Leon. 251.

(c) It is said, S. C. Fortesc. 182. the Court held, that the devise of "all the rest and residue of my messuages, lands, &c." did not convey what was expressly devised before, for that wills must be construed according to the intent of the testator at the time of making the will; that his intention was to give his whole estate in that messuage to *Carter* in fee; that at the time the will was made he had no "rest and residue" left in that messuage; and that the devise to *Carter*

being void, the house passed to the heir at law, and not to *John Lammes*.—And in Easter Term, 2. Geo. 2. in the case of *Roe v. Fludd*, where the testator devised land to *R. B.* in fee, and all the rest and residue of his estate, real and personal, to *E. F.* in fee; and *R. B.* died in the lifetime of the testator, it was held on the authority of the above case, that *E. F.* could not take the land devised to *R. B.* because that was not any part of the rest and residue of the testator at the time the will was made.—Fortesc. 184. See *Goodright v. Opie*, ante, 124.

HILARY TERM,

The Tenth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powis, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt.

} *Justices.*

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Anonymous.

Case 145.

AN EXECUTION was taken out against the testator in his life-time, and executed after his decease. The writ was returnable *octab. Martini*, and executed on the sixteenth day of *November*, which was two days before the return was out.

A fieri facias taken out before, may be executed after, the death of the defendant without suing out a *scire facias*.

IT WAS OBJECTED, that this execution was ill, being executed after the testator's death, and without any *scire facias* brought, to shew cause *quare executionem non habet*.

2. Vent. 218.

THE COURT. The execution being sued out before the testator's death may be executed afterwards without a *scire facias*, as was resolved in *Dr. Needham's Case* (a); and it may be executed at any time before the return of the writ; nay, an execution of it on the very day that it is returnable, is good; and if it be executed in the Vacation, it shall refer to the antecedent Term, and so it shall, if it be executed in Term-time: so is the case of *Parker v. Moss* (b), which was determined in *Easter Term*, in the thirty-second year of *Queen Elizabeth*.

1. Sid. 29.

1. Term Rep. 361.

Sellon's Pract.

545.

(a) 12. Mod. 5.

(b) Cro. Eliz. 181.

Case 146.

Crundell *against* Bodily.

EJECTMENT.—The defendant had a verdict and judgment, and costs taxed, and then the plaintiff brought a writ of error in THE EXCHEQUER-CHAMBER, and pending that writ he brought a new ejectment.

It, after a verdict for the defendant in ejectment, and costs taxed, the plaintiff bring error, and pending it a new ejectment, the second action shall be stayed until the costs in the first are paid.

IT WAS MOVED, that he might not proceed on this ejectment until he had paid the costs of the first.

* IT WAS INSISTED *for the plaintiff*, that he did not bring this writ of error to avoid the payment of the costs, neither was the verdict and judgment against him in the first ejectment any bar to his bringing another ejectment. It is true, it may be evidence against him, but it is no bar; therefore this motion comes too soon, and ought to be suspended until the errors assigned are determined in THE EXCHEQUER-CHAMBER, and the judgment either affirmed or reversed.

* [226]

S. C. Stra. 554.
Salk. 255.

4. Mod. 374.

1. Bac. Abr.

"Costs" (H.).

THE COURT thought it hard that the defendant should be doubly vexed by the proceedings on the writ of error, and by a new ejectment; therefore made a rule, that if the plaintiff proceed on the ejectment, he shall pay the costs of the first, otherwise he shall not proceed on the second (a).

(a) Roberts v. Cook, 4. Mod. 379. Wick v. Law, 2. Bl. Rep. 1158. 1180.
Shert v. King, 1. Stra. 671. Parker v. Hamilton v. Hatherley, 2. Stra. 1152.
Troublesome, 2. Stra. 1099. Ginger v. and see Hulleck on Costs, 445 to 467.
Barnardiston, 2. Bl. Rep. 904. Chad-

Case 147.

The King *against* Colvin.

AN attachment lies against a gaoler for corruptly refusing to return a *habeas corpus*.

UPON A MOTION for an attachment against the defendant, who is a gaoler, for denying to return a *habeas corpus* directed to him, and for extorting a note from the prosecutor, then in his custody, so as by menaces and dures he was forced to comply, and give the note for payment of money to the gaoler;

2. Roll. Abr. 32.

2. Show. 172.

2. Jones, 178.

2. Hawk. P. C. ch. 22. s. 31.

THE COURT made a rule, that he should shew cause why an attachment should not go.

An attachment lies against an associate for altering a record.

2. Hawk. P. C. ch. 22. s. 12.

NOTA. An attachment issued out against AN ASSOCIATE for mending a record after a motion in arrest of judgment for the same fault, which he mended; but upon his making the record as it was before it was mended, and paying costs, the Court, *ex gratia*, superseded the attachment.

Case 148.

Taylor *against* Lake.

A *disfringas* stamped before the *posse* is returned, is good.

A MOTION was made to set aside two verdicts, because the *disfringas*'s were not stamped pursuant to 9. & 10. Will. 3. c. 25. s. 59. so that the trials were void by the stamp-act.

S.C. 1. Stra. 575.

But

Hilary Term, 10. Geo. 1. In B. R.

But the solicitor having got those writs stamped before THE FOSTER was brought into court, this motion was rejected, for it did not appear to them but that they were stamped; and they could not take any notice, whether they were stamped, or not, at the assizes; if they were not, the defendant should have taken notice, and insisted on it at that time.

TAYLOR
against
LAKE.

* [227]

Anonymous.

Case 149.

IT WAS HELD by the Court, that it is not sufficient to deliver a copy of a declaration to the turnkey or gaoler * where the defendant is in custody (a), unless the declaration is first filed in the office; and therefore where a judgment was had upon a declaration so delivered, it was set aside by the Court.

Where a defendant is in actual custody, the bill must be filed before a copy of it is delivered to the gaoler.

And if judgment be regularly obtained against such defendant, the plaintiff must charge him in execution within two Terms afterwards, and not after those two Terms are expired, or if he be charged afterwards, the Court will discharge him with costs.

Tidd's Pract.
188.
5. Com. Dig.
"Pleader"
(C. 4.).

(a) See 4. & 5. Will. & Mary, c. 21.

The King against Pepper.

Case 150.

A RULE of this court was made in the fifteenth year of Charles the Second, that the plaintiff should set forth in his writ or bill an *ac etiam* of the sum for which he expected the defendant should give bail; and that if he brought an action without any cause, on purpose to hold the defendant to special bail, he should be punished.

An attachment does not lie for inserting a larger sum in the *ac etiam* than is due, in order to oust the party of bail.

THE COURT was now moved for an attachment against Pepper, who brought an action, with an *ac etiam* *libere* in a great sum, to hold the defendant to special bail, where nothing was due, as it appeared before a Judge, the plaintiff being summoned before him to shew his cause of action; and this was said to be an abuse of the process of this court, and consequently a contempt.

3. Lev. 311.
Lutw. 1572.
1. Salk. 14.
1. Sid. 424.
1. Mod. 4.

THE COURT held that this was not such a contempt as to issue out or grant an attachment against the plaintiff, but directed, that if the defendant was damned, he might bring his action.

Andrews against Harper.

Case 151.

IN the court of common pleas there is but one *scire facias* against the bail, and upon a *nihil* returned there is execution.

Where the sheriff returns *nihil* upon a *scire facias*, another *scire facias* shall be awarded.

But in the court of king's bench, the course is to have two *scire facias*'s against the bail; a *scire facias*, and an *alias scire facias*; but both must not be sued out together, as formerly; for the first

Dyer, 168. 172. 201. 5. Com. Dig. "Pleader"

shall

2. Inst. 472.
3. L. 9.).

Hilary Term, 10. Geo. 1. In B. R.

ANDREWS
against
HARPER.

shall be duly returned, before the *alias scire facias* is sued out, which must bear *teste* on the day of the return of the first; and there must be fifteen days inclusive, between the *teste* of the first and the return of the *alias*.

* [228] In the principal case, THE COURT was moved to set aside a judgment obtained against the bail * upon two *scire facias*'s brought against them, because it did not appear that the judgment was had on the return of *two nibils*.

It was referred to THE MASTER to examine this matter.

Case 152.

Wadsworth against Handyside:

If a bill be filed against a member of parliament, and he appears upon the summons and files common bail, and a declaration is not delivered within four days of the end of the Term, he shall have an *imparlance* until the next Term.

Tidd's Pract.
82. 84.
Impey, 5th edit.
490.

THE DEFENDANT was a member of parliament, and appeared, and filed common bail.

IT WAS MOVED that he might have no *imparlance* over to the next Term. By the statute 12. & 13. Will. 3. c. 3. it is enacted, "That actions may be brought in any of the courts in *Westminster*, against any person entitled to privilege of parliament, immediately after the dissolution or prorogation, until a new parliament, or the same is re-assumed, and immediately after an adjournment of both houses for above fourteen days, until re-assumed; and that persons having cause of action against any member of the house of commons, may have process against him during the time aforesaid, out of the said courts, [by summons, by distress infinite, or by original bill, summons, attachment, and distress infinite, till the defendant shall appear and file common bail, &c. (a).]" This being a proceeding in a special manner directed by this statute against *privileged persons*, the usual practice is, when an action is brought against such *privileged person*, to file a bill in nature of a *special capias* against the defendant, and then to *summons* him; and if he appears upon such *summons*, then the plaintiff may declare against him as *in custodia marischalli*; to which declaration he ought to answer without any *imparlance*.

IT WAS INSISTED for the defendant, that this suit was against a member of parliament; that if he was not a *privileged person*, he might have an *imparlance*, of course, to the next Term, since the declaration against him was not delivered before the *morrow of All-Souls*; that if a *special original* is brought against a person who has no privilege, he must likewise have an *imparlance* of course; and that it would be a very proper method to leave those who had no privilege, and those who were privileged, upon the same footing. As to the act of parliament mentioned on the other side, it has no manner of influence on the practice of the Court; it only appoints a method to bring privileged persons to appear. * But admitting that the plaintiff might proceed in this case as by *special original*, yet that would not be a reason against granting an *impar-*

* [229]

Hilary Term, 10. Geo. 1. In B. R.

lance, because the *summons* is still general, and so is the *capias*; and it is not the *special original*, but the *special capias* which hastens the proceedings; and it would be very hard to take this as a case where a *special capias* is allowed to be the first *summons*; therefore it was insisted for the defendant, that he might have leave to imparl (*a*).

WADSWORTH
against
HANDYSIDE.

THE COURT was of opinion, that the proceedings in this case should be like those in most other cases, and not be influenced by the state of either party; and that if they are founded on a *special original*, then there lies an *imparlance* of course till the next Term.

(a) Skin. 2. Tidd's Pract. 242.

Long against Nixon.

Case 153.

THIS was an action brought in *London*; and the defendant moved the Court to change *the venue*.

The Court will not discharge a rule obtained on the common affidavit to change the *venue*, on the ground, that if the action be by *original*, the changing it will create a *variance*.

A rule was made that it should be changed.

The plaintiff now moved to discharge that rule.

IT WAS INSISTED *in behalf of the plaintiff*, that this is a transitory action, which the plaintiff might bring where he pleased; and that it was by the indulgence of the Court, and for the ease of the parties, that *venues* are, at any time, changed, and that it would be very inconvenient for the plaintiff if this *venue* should be changed, because the action being brought by *special original*, there would be a *variance* upon changing the *venue*, therefore it is convenient for the plaintiff, that the action should be tried in *London*.

1. Will. 173.
2. Stra. 1162.
1202.
1. Com. Dig.
"Action"
(N. 131).

IT WAS SAID *for the defendant*, that though it might be convenient for the plaintiff, yet it might be otherwise for the defendant, to have this trial in *London*, and that there could be no inconvenience to the plaintiff, though the action was brought by *special original*, for such actions are frequently brought in the court of common pleas, and there the *venues* are daily changed.

THE COURT would not discharge the rule for the changing *the venue*, for if they should, then, where an action is laid in *London*, the *venue* would never be changed; and as to *the variance*, the defendant shall take no advantage of it, though the action was brought by *special original*.

The King against Burridge, the Mayor of Tiverton. Case 154.

PRATT, Chief Justice. If an affidavit be laid before the Court of suspicion that there will not be a *fair jury*, and the adverse party will not consent to a *good jury*, we will rule one without his consent. It is done every day in the court of common pleas.

Rule for a jury without consent.

EASTER

E A S T E R T E R M,

The Tenth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt.

} *Justices.*

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

* [230]

* Knight *against* Cambridge.

Case 155.

Hilary Term, 10. Geo. 1. Roll 375.

WRIT OF ERROR to reverse a judgment given for the plaintiff in the common pleas in an action brought on A POLICY OF INSURANCE "against the perils of the " sea, winds, pirates, and barratry of the master."

The declaration laid for breach, that the ship was lost by the fraud and negligence of the master; and *non assumpsit* was pleaded.

A CASE was made at the trial, which shewed the policy of insurance, which insured the ship against all losses and misfortunes, and against barratry; and then shewed that the ship was lost by the wilful fraud and direct negligence of the master.

The question was, Whether such loss is within the policy?

IT WAS INSISTED *for the defendant*, that it was not.

FIRST, This verdict will not warrant this judgment, because fraud is not within the general words of this insurance, which, like other covenants, must have a reasonable construction. If a man sell lands, with a covenant in the purchase-deed, for quiet enjoyment, "without any disturbance, &c." certainly those words

If the master of a ship, intending to avoid the payment of port duties, attempt to run her out of port, and is stopped, and the ship thereby forfeited, this is barratry in the master, and renders the underwriter of the ship liable, within the terms of a policy insuring against the barratry of the master.

S. C. 1. Stra. 581.
S. C. 2. Ld. Ray.
1349.

must Cowp. 143.
Park, 399.

KNIGHT
against
CAMBRIDGE.

must be intended to be against a "lawful disturbance" (a). General words may be restrained to a particular signification.

SECONDLY, The breach is assigned too general; for there are several frauds in the master, which the insurers are not obliged to make good (b). Now it is plain, that *negligence* is no *barratry*, because *barratry* is a fraud which does not include a neglect; and the merchant has his remedy against the master for any neglect; so that admitting there was a neglect in the master, yet if it be not within the policy, * the insurers cannot be charged; and for these reasons the judgment ought to be reversed.

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ON THE OTHER SIDE *it was said,*

FIRST, That this policy of insurance was drawn in as general words as could be invented. But it is not true, that it must be expounded as other covenants, and like the covenant for quiet enjoyment, which, though in general words, extends only to a legal disturbance, and for very good reason; that being the disturbance which is only intended: but it is otherwise in policies of insurance, which were intended to encourage trade, and that merchants might venture more freely, because if any loss should happen, they might bear it with more ease.

SECONDLY, That *barratry*, in its nature, is any kind of cheating, and the verdict finds that this ship was lost *per fraudem. et negligentiam* of the master; and it is generally known, that ships are never wilfully sunk but after some *barratry* committed, for then they are destroyed to conceal the villainy, so that *fraus et negligentia* is a plain *barratry* within the words of this policy. Therefore since insurances began and are upheld to encourage merchants to trade, and that the words of this policy are sufficient to charge the insurers, and there is no default in the merchant (c), it is unreasonable that the wilful default of the master should avoid this insurance; therefore the judgment should be affirmed.

THE COURT. Every neglect of the master is not within this policy; and if he run away with the ship or embezzle the goods, the merchant may have an action against him: but yet he may provide against it in another manner, *viz.* by insuring his ship and goods to secure himself against such acts of *barratry*; for it is reasonable that merchants who venture a large share of their stocks should secure themselves in what manner they think proper against the *barratry* of the master, and all other frauds. "*Barratry*" is a word of more extensive signification than only to include the mas-

(a) Vaugh. 122. 2. Saund. 180.

(b) Molloy de jure Maritimo, 282. f. 12. Grotius de Jure Holland.

(c) It is essential to *barratry* that the wrong be committed by the master and mariners against the owners, and therefore if the owner is privy to or cause the wrong, it is not that species of *barratry*

that will render the underwriter liable, Nutt v. Bordieu, 1. Term Rep. 323. If the master is an owner, and commit *barratry*, the underwriters are not liable, Ross v. Hunter, 4. Term Rep. 33. See also Elton v. Brogden, 2. Stra. 1264. Stamina v. Brown, 2. Stra. 1173. Vallegio v. Wheeler, Cowp. 143.

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ter's running away with the ship : it may well include the loss of the ship by his fraud or negligence.

KNIGHT
against
CAMBRIDGE.

SECONDLY, A breach assigned in the words of the covenant is good, as here, *per barratriam magistri*, had been good ; but it is equally good to assign the breach in words tantamount. Where is the difference between running away with a ship and sinking it ?

THE JUDGMENT was affirmed.

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Wilkinson against Meyer.

Case 156.

Tuesday, 28 April 1724.

AN ACTION OF COVENANT was brought upon an indenture, wherein the plaintiff covenanted to transfer, and the defendant to accept a transfer of so much SOUTH-SEA STOCK at any such a time, and to pay so much money for the transfer.

The statute of 7. Geo. 1. st. 2. c. 1. s. 8. which requires that every purchaser of South-Sea Stock shall be entered and registered in the books of the Company, and express the names of the parties for whose use or benefit such contract was made, is sufficiently complied with by entering the deed of contract *verbatim*, and subscribing the entry thus, " *this is for my proper use and benefit* " A. B. ;" but in an action on this contract, the defendant may shew that the stock was for the use and benefit of another person.

This action was now brought for the money.

The defendant pleaded, that the contract was not registered according to the statute 7. Geo. 1. stat. 2. c. 8. s. 8. by which it is enacted, " that every contract for the sale or purchase of subscriptions or stock of the South-Sea Company, &c. shall be entered in books to be kept for that purpose by the Company, to whose capital such stock or subscription did belong, and in default of such entry, every such contract shall be void ; and such entries shall express the names of the parties for whose use such contracts were made, &c."

Issue was joined thereon ; and at the trial at *nisi prius* A CASE was agreed to, which was as follows :

The plaintiff made an entry of the contract *verbatim*, and at the bottom thereof used these words, " this is for my proper use and benefit, PHILIP WILKINSON." It was further stated, that no evidence was given to prove the contract to be made for the benefit of any other person.

The question was, Whether this is a good registry according to the directions of the act of 7. Geo. 1. c. 8. the plaintiff in registering this contract not having expressed the names of the parties for whose use it was made, but only that it was for his own use ?

STRANGE, for the plaintiff, argued, that this was a good registering of the contract within the act, which was made on purpose to prevent doubtful suits, on account of so many persons being made trustees ; and though it may be objected, that this registering only shews who has the benefit of the contract their made, yet it was the intent of the Legislature, that contracts to be made at any time after should be registered, on purpose to shew who they were that had a right to the stock ; and this is sufficiently shewed by

S.C. 2. Ld. Ray.
1350.
S. C. 2. Str.
585.
Ante, 173.

WILKINSON
against
MEYER.

registring it as before-mentioned. It appears by this registry that the plaintiff had both the legal and equitable right. The objection arises only from the difference of the words "were" and "is." The act requires the entry to express "for whose use such contracts *were* made;" and here it is entered, "this *is* for my use, "P. W." But this act is not to be construed strictly to bar persons of their right. Even in common law conveyances words of a past and present tense are used promiscuously, and do not import a different construction: as in gifts, "*procreatis*" shall extend to issues begotten afterwards, and "*procreandis*" to issues begotten before (a).

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FAZAKERLEY *for the defendant*. The words of the act being plain, "that the entries, &c. shall express the names of the parties "for whose use the contracts were made," such an entry as in the principal case will not be good, for it is not within the statute, that being made to quiet the minds of the people, and for that reason should * have a favourable construction: but the intent of the statute is not answered by this sort of registering; for the entry that it was "for the plaintiff's own use," may be in trust for A DIRECTOR of the Company at the time of making the contract, though it may be for his own use at the time of making the entry; and the act plainly imports, that the entry should shew for whose use it was at the time of making the contract; for if it was to the use of any of the Directors, who by fraud had raised the value of the *South-Sea* stock, it would be void, and an action would lie against him for so much money received to the use of him who paid it. Now this statute being made to discover the estates of those who had cheated the people, and to quiet their minds, and to prevent the frauds of the Directors, that they might not for the time to come have any benefit of such contract; it ought to have as liberal a construction as the Legislature intended, therefore the entry should shew for whose use this contract was made.

TO WHICH *it was answered*, and admitted, that this statute ought to be carried as far as possible, to obviate the frauds of the Directors; but there could be no fear in this case, that any of them could be concerned, because this was a contract for *lottery annuities*, which the Directors always subscribed in their own names, but not the *money-subscriptions*.

THE COURT. The questions are, Whether this entry has complied with *the words* of the act? If not, then, Whether *the meaning* of the act be satisfied or not?

PRATT, *Chief Justice*, and THE COURT. The act intended that the defendant should know what person had the equitable, and what person had the legal right to demand the money on the contract. The person is to register first the name of the person interested and the contract. The act is not to be made use of as a snare to

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intangle people's rights. If it was the plaintiff's contract when he registered it, it shall be intended to have been his when the contract was made. The contract itself, which is entered *verbatim*, appears to be made to the plaintiff, and to be for his own use; and no evidence was given to the contrary. 3. Lev. 1.

WILKINSON
against
MYERS.

Judgment was given for the plaintiff.

But on this judgment for the plaintiff, a writ of error was brought in THE EXCHEQUER-CHAMBER by the defendant; and in *Trinity Term* following, it was moved to amend * the *venire facias*; for this being an action of covenant, and the defendant having pleaded several pleas, and the plaintiff having replied to one, and demurred to the rest, the *venire facias* was drawn in the usual form, "*tam ad triandum exitum quàm ad inquirendum de damnis*," these last words, "*ad inquirendum de damnis*" ought to be struck out.

Motion to amend a record.

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TO WHICH it was answered, that if the Court should give leave to amend this record after a writ of error brought, it is but reasonable that the plaintiff in the original action should pay costs; for it is probable, that the writ of error was brought by the defendant for this very fault. 3. Lev. 361.

THE COUNSEL for the defendant in error thereupon offered to pay costs, if the plaintiff would waive his writ of error, for then it will appear, that it was brought for this very fault; but if he would not waive it, then it must be brought for delay.

But he refusing to waive it, the defendant had leave to amend without paying costs.

Webster against Geering.

Case 157.

A MOTION was made to quash the proceedings against the bail, the plaintiff having declared for more than was contained under the *ac etiam* in the bill. To quash the proceedings against the bail.

ONE JUDGE replied, that in the case of *Wiatt v. Evans (a)*, in the year 1694, it was adjudged to be a discharge of the bail. S. C. 1. Bar. 77. Cro. Jac. 128. 630.

ANOTHER JUDGE said, that in the court of common pleas it was held good *pro tanto*. 6. Mod. 266. 1. Bar. K. B. 25.

But there being two causes of this kind now depending, the proceedings were stayed in this cause until the point was resolved in the others.

(a) 3. Salk. 55. pl. 1.

Case 158.

The King against Pindar.

In *quo warranto*, if the defendant be found *duly elected* but not sworn into his office, judgment of *ouster* shall be given.

UPON AN INFORMATION in the nature of a *quo warranto* against the defendant, for usurping the office of mayor of the corporation of *Penryn* in *Cornwall*, the defendant pleaded, that he was *debitè electus*, and sworn into the said office, &c.

The plaintiff replied, that he was not elected, and sworn *modo et formâ*, &c. as he had pleaded, and thereupon they were at issue.

The jury found that he was *duly elected*, but that he was not *duly sworn* into the office, &c.

Upon a motion to set aside this * verdict, it was insisted, that he was not mayor until duly sworn, and therefore that he had usurped the office, and that judgment of *ouster* ought to be given and entered against him.

BUT *on the other side* it was said, that the election being found to be regular, the defendant was intitled to a *mandamus* to be sworn; but if there is a general judgment of *ouster* against him, in such case he cannot have a *mandamus* to be sworn by virtue of any precedent election; therefore it would be prejudicial that such judgment should be entered against him.

And there being no precedents in what manner it should be entered, the Court was moved to give some directions therein, so as the entry of the judgment might not hinder the defendant from obtaining a *mandamus*.

THE COURT bid them enter their judgment according to law.

RAYMOND and FORTESCUE, *Justices*, thought it rightly entered.

REYNOLDS, *Justice*, doubted.

THE COURT gave judgment of *ouster*, which was afterwards affirmed in the house of lords (a).

(a) See *Rex v. Hearle*, *Str.* 625. 627.

Case 159. The Parish of Buckingham against The Parish of Shepton Bechamp.

Indentures of apprenticeship are not cancelled by the matter becoming a *bankrupt*, or by his delivering the indentures to a person to whom bound an apprentice at twelve years of age to *John Cary* at *Buckington*, where he lived forty days; but the master becoming a *bankrupt*, or by his delivering the indentures to a person to whom bound an apprentice at twelve years of age to *John Cary* at *Buckington*, where he lived forty days; but the master becoming a

UPON A MOTION to quash an order of sessions, the case was thus:

An order of two justices was made for removing *Richard Allen* from the parish of *Shepton-Bechamp* to the parish of *Buckington*.

On appeal, the sessions confirmed the order, but stated the case specially—That *Richard Allen* was born at *Shepton-Bechamp*, but bound an apprentice at twelve years of age to *John Cary* at *Buckington*, where he lived forty days; but the master becoming a

early servant.—S. C. *Str.* 582. S. C. 2. *Ld. Ray.* 1352. *Fort.* 321. *Foley*, 229. *Scff.*

278. *Comm's Poor Laws*, 2. vol. 578.

bankrupt,

bankrupt, *Richard Allen* hired himself as a servant for a year to *Joshua Glover* in *Buckington*, and served accordingly; during which service the apprenticeship expired, when *John Cary* delivered up the indentures to *Joseph Glover*.

THE PARISH
OF
BUCKINGTON
against
THE PARISH
OF SHEPTON-
LEACHAMP.

IT WAS INSISTED, that a hiring *de facto* will gain a settlement for a man, as well as a marriage *de facto* will gain dower for a woman.

TO WHICH it was answered, that this hiring could not gain any settlement, because the indenture of apprenticeship was still subsisting, and could not be discharged but by some other deed, or by the sessions, so that this was not a lawful hiring; and if so, then a service for a year in pursuance of such an illegal hiring, cannot gain a settlement.

THE COURT held, that the pauper was settled at the parish of *Buckington*, under the indentures of apprenticeship; for as they were not delivered up, or cancelled by the master becoming bankrupt, he had no power to hire himself to *Glover*.

And both the orders were confirmed.

* Anonymous.

* [236]

Cafe 16c.

A MOTION was made to stay the proceedings on a judgment, suggesting, that part of the money was paid, and that the defendant was willing to pay the rest into court.

To stay proceedings on a judgment, for that part of the money was paid. Post. 242.

TO WHICH it was replied, that what money the plaintiff had already received, was in discharge of some other debts between him and the defendant; but upon producing his receipt, it appeared to be paid indefinitely, viz. as so much due upon account.

Cro. Eliz. 68.
Stiles, 239.
Moor, 677.
2. Ch. Rep. 18.
Finch. Rep. 89.
1. Vern. 34.
468.
2. Vern. 656.
Comb. 463.
12. Mod. 559.

THE COURT. Where a debtor owes money to his creditor upon several accounts, he may pay part, and apply it to any debt; but if the creditor deny that he received it in satisfaction of that debt, but upon some other account, then he has election to apply the payment to what debt he will (a); so where it appears that money is paid indefinitely, the creditor has election to declare on what account he received it (b). Therefore if the debtor in the principal case would have this payment applied to the judgment, upon equitable terms, he should likewise pay or tender all the money due to the plaintiff on simple contract, or otherwise, as far as the penalty of the judgment covers such debts; for this Court will not compel a creditor by judgment to accept a less sum than is due on the judgment, upon the account of any former indefinite

(a) See *Bois v. Cranfield*, Stiles, 239. contra.

(b) See the case of *Goddard v. Cox*, 2. Stra. 1124.

Anonymous. payments, when there were other accounts depending between the parties, unless the defendant will consent to bring in all that is due to the plaintiff (a).

(a) Though the defendant shews to the Court a discharge from the plaintiff of part of the debt, yet if it appear to be given after purchasing the writ, or that the plaintiff's whole demand is not satis-

fied, or even that any part of the costs are unpaid, the Court will permit the plaintiff to proceed. *Far v. Burnley*, Mich. 2. Geo. 2. C. B.—NOTE to the former edition.

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Case 161.

* *Martin against Henriques.*

Judgment set aside, because signed within four days, &c.

UPON a *scire facias* on a judgment against the principal, he pleaded "*nul tiel record.*"

The plaintiff thereupon produced the record, and THE MASTER signed the roll *quod querens protulit recordum*, and the plaintiff signed judgment the very next day, and took out execution.

But upon a motion this execution was set aside as *irregular*, because he ought not to have signed the judgment until *four days* after the record was brought in.

Case 162.

Christy against The Manucaptors of Anstruther.

Thursday, 23 April, 1724.

Quere, Whether special bail shall be given in an action of debt on a recognizance of bail given pursuant to 3 Jac. 1. c. 8.

Deugl. 449.

UPON A WRIT OF ERROR brought in THE EXCHEQUER CHAMBER on a judgment given in the king's bench, the now defendants entered into a *recognizance* pursuant to the statute 3 Jac. 1. c. 8. "that the plaintiff in error should prosecute his writ with effect; and if the judgment should be affirmed, then to pay the debt, damages, and costs." Afterwards the judgment was affirmed, and then the plaintiff brought an action of debt upon this *recognizance* against the bail.

The question was, Whether they should be discharged upon common bail?

IT WAS SAID by *their Counsel*, that they ought to be discharged, for it is against the practice of the Court, that bail should be required of bail.

ON THE OTHER SIDE it was said, that it was never yet determined, that special bail is not requirable in an action of debt on a recognizance of bail; but the reason of the case seems to require it, because the recognizance is directly for payment of money, *viz.* "to pay the debt if the judgment should be affirmed;" and certainly it was never yet denied, that where an action of debt is brought on a bond for payment of money, but that special bail is always required; and the reason is the same for special bail in an action of debt upon a recognizance against the bail, for such recognizance is a security for the payment of the condemnation-money, and a collateral

Easter Term, 10. Geo. 1. In B. R.

collateral undertaking, that it shall be paid upon the affirmance of the judgment; and the bail upon the recognizance cannot be discharged but upon payment of the money, for they cannot render the principal, because such render does not lie by the bail upon a writ of error.

CHRIST
against
THE
MANUFACTURERS
OF
ANSTRETH.

THE COURT doubted; it depending on practice, and practitioners not agreeing.

* [238]

FORTESCUE and RAYMOND, *Justices*, seemed of opinion, that special bail might be required; and thought that in debt upon a judgment special bail was always given.

PRATT, *Chief Justice*, rather inclined to think so.

Adjournatur.

Shipton against Hopton.

Case 163.

THIS was an action of DEBT, *qui tam*, &c. (a) brought by a common informer, on the statute 5. Ann. c. 14. for fifteen pounds, wherein the plaintiff declared on two several counts, one for ten pounds for killing two partridges, the other for five pounds for keeping an engine to destroy the game, not being qualified, &c. *virtute statutorum hujus regni*; upon *nil debet* pleaded, the plaintiff had a verdict for five pounds only.

Debt for keeping an engine to destroy the game.

It was now moved, that he might enter the verdict on either of the counts, because the defendant intended to move in arrest of judgment; for though he might not be qualified by the statutes of this land to keep a gun, yet if he be otherwise qualified by law, he is not subject to this penalty. Now he may be qualified by law, as being huntsman to a nobleman, who, in coming up to the parliament, may kill a deer in any of the king's forests; and this he may do by the Forest-law, which is part of the law of this realm.

And for this reason the plaintiff was ordered to enter his judgment.

(a) This action is given by the statute 3. Geo. 1. c. 19. by which it is enacted, "that where an offence shall be committed against any law for preserving the game, and the offender liable to

"pay a pecuniary penalty, upon a conviction before a justice, any person may sue for it by an action of debt." See now 26. Geo. 2. c. 2. 2. Geo. 3. c. 19.

Burgess against Bracher.

Case 164.

BY ARTICLES made between the plaintiff and the defendant for a horse-match, it was agreed, that the plaintiff should ride "without whip or flick, or other weapons, except boots and spurs."

If an agreement be that A. shall ride a horse-match "without whip or flick,

"or other weapons," and in an action on this agreement the declaration state, that A. rode the match "without whip AND flick OR other weapons," the variance is cured by the verdict.—S. C. 2. Ld. Ray. 1366. S. C. 1. Stra. 554.

An

DEFOLE. An action of covenant was brought on these articles, and the
DECLARATION. declaration set forth, that the plaintiff mounted the horse *sine flagello et baculo vel aliis armis*, and did ride *in formâ prædictâ*.

Upon the general issue pleaded, the plaintiff had a verdict.

[239] IT WAS MOVED *in arrest of judgment*, that this declaration was not pursuant to the article of agreement, for that was to ride "without whip or stick, or * other weapons," in the disjunctive; and the declaration is *sine flagello et baculo* in the conjunctive.

This case was compared to some cases which were adjudged upon wagers in the late wars, *viz.* "that the English would beat the French without the help of the Germans or the Dutch;" and in an action brought for the money won, the plaintiff laid in his declaration, that the English did beat the French without the help of the Germans AND the Dutch; and this was held ill.

IT WAS OBJECTED *on the other side*, that there is a case in *Cro. Eliz.* (a) where the defendant was by agreement to pay so much money when such a ship arrived in such a port; and the declaration was, that the ship arrived *ad portum*, instead of *in portu*; and this was moved in arrest of judgment, but not allowed: which is very true, because the preposition *ad* signifies *at* or *in*. Deeds, it was said, ought to be favourably construed; because they are made by the consent of the parties; but it does not follow from thence, that declarations ought to have a favourable construction; for the reason is not the same, because they charge the defendant in an adversary manner, and are presumed to be drawn by persons of skill; besides, deeds are taken most strongly against the grantor (b). Besides, the riding "without whip and stick" alters the whole sense of the articles, for he may ride without both, but still he may ride with one of them; therefore the plaintiff should have laid in his declaration, that he rid without either.

REEVE *contra*. The averment is a good averment, and would be so on a demurrer; for the construction must be *sine flagello et sine baculo*, for *sine* is understood, and governs both the cases: and though the agreement varies in expression from the averment, yet both in substance are the same.

SECONDLY, The latter end of the sentence being disjunctive, "*vel aliis armis*," must refer to every precedent allegation, and so make the whole disjunctive (c).

THIRDLY, If the averment was insufficient, yet it is cured by the verdict; for otherwise the plaintiff could never have a verdict; therefore it must be intended, that this was proved at the trial (d); and there are several cases to warrant such intendments. To instance in one; *indebitatus assumpsit* (e) was brought for money received

(a) Cro. Eliz. 229. pl.

(b) Cro. Eliz. 348.

(c) 2. Bull. 293.

(d) Moor, 239. Cro. Eliz. 229.

(e) Poulter v. Cornwall, Salk. 9.

upon account; after a verdict for the plaintiff, it was moved in arrest of judgment, that this action would not lie, but an action of account; for if a man receive money to account, it is not to be demanded as a duty from him until he has neglected or refused to account; and this must be set forth in the declaration; but it was adjudged, that the declaration was helped by the verdict, and that it shall be intended he refused to account, or had done something to make him an absolute debtor.

BURGESS
against
BRACHER.

* THE COURT. If the terms of the agreement had not been proved at the trial, the plaintiff could not have a verdict; so it must be intended that the agreement was sufficiently proved; and there are several cases wherein it has been adjudged, that where words may be taken in a double sense, the Court, after a verdict, will always construe them in that sense which may support the verdict: now here the jury found, that the plaintiff did ride "*sine flagello et baculo vel aliis armis*," in which the disjunctive "*vel*" in the latter part of the sentence, qualifies the conjunctive "*et*," and disjoins that copulative; so that it shall be taken in a disjunctive sense.

* [240]

So judgment was given for the plaintiff.

The East-India Company *against* Ellis.

Case 165.

AFTER a judgment by default for the plaintiff, and a writ of inquiry brought, it was moved, that it might be executed before THE CHIEF JUSTICE, at the sittings at Guildhall in London, the action being brought for twenty thousand pounds: and a rule was made accordingly.

Writ of inquiry
executed before
the Chief Justice.

Hutchinson *against* Smith.

Case 166.

ONE T. S. was arrested at the suit of the plaintiff *Hutchinson*, and *Smith*, the defendant, became bail to the sheriff for the appearance of the said T. S. at the return of the writ; but before any farther proceedings, *Hutchinson* died; yet his attorney took an assignment of the bail-bond, and proceeded to judgment and execution against the bail.

The plaintiff
died before the
return.

And now the Court was moved to set aside these proceedings as irregular.

And the matter being so reported by THE MASTER, they were set aside.

The King *against* Dunbarr.

Case 167.

UPON THE MASTER's report, the case appeared to be as follows:

Attachment
against persons
rescuing prisoners
who was taken
upon an escape
warrant.

The defendant *Dunbarr* was a prisoner in the *King's Bench*, and charged in execution there at the suit of one *Pilkington*, and afterwards was turned over to the *Fleet*, and there likewise charged

in

THE KING
against
DUNBARR.

in execution at the suit of the * same party; and on the thirtieth day of *January* last was taken in *Leicester Fields* upon an escape-warrant, signed by one of the Judges in the court of king's bench, and then he insisted on a day-rule, but upon search there was none for that day; thereupon, as he was carried through THE OLD BAILEY towards *Newgate*, the officers of *the Fleet* rescued him.

And now upon a motion for an attachment against them, and that *Dunbarr* might be taken out of *the Fleet* and sent to *Newgate*; it was insisted for him, that he being charged in execution in *the Fleet*, could not be taken by an escape-warrant issuing out of the court of king's bench.

Besides, he thought he had a good day-rule, for his name was entered in the petition for day-rules on the thirtieth day of *January*, but the clerk did not come in time to have it read in court that day.

THE COURT. As to the objection, that this man being charged in execution in *the Fleet* (which is the prison of the court of common pleas) cannot be taken by an escape-warrant signed by any of the Judges of the court of king's bench; it appears to be otherwise upon reading the statute (a), by which it is enacted, "that if any person charged in custody in *the King's Bench* or " *Fleet*, in execution, or on mesne process, &c. shall go at large, " upon oath made thereof in writing before the Judge of the court " where the commitment, action, judgment or execution was, such " Judge shall commit the person escaped to the common gaol of " the county where retaken, there to remain without bail till dis- " charged by law."

So that any Judge of the court where the action was brought may grant an escape-warrant; and a Judge of the common pleas may grant it, though the prisoner is turned over and charged in execution in *the King's Bench*, and so *vice versa*.

As to the entry of his name in the petition for a day-rule it signifies little unless it is read in court.

Therefore an attachment was granted against those who rescued *Dunbarr*, and a rule was made that he should be taken out of *the Fleet* and sent to *Newgate*.

(a) 1. Ann. cap. 6.

Case 168.

* Cloud against Nicholson.

An action lies against one of two joint obligors; but the joint contract may be pleaded in abatement.

TWO PERSONS were jointly bound in a bond; and in an action brought against one alone, the plaintiff had a verdict.

IT WAS NOW MOVED in arrest of judgment, that though this might have been pleaded in abatement of the action, yet since it appears upon the face of the record in which the bond was entered, that the plaintiff had no right against one alone, he cannot have judgment.

1. Saund. 291.
Cro. Eliz. 356.

1. Vent. 34. 136. Lut. 696. Stra. 503. 1. Com. Dig. "Abatement" (F. 8.). And see Rice v. Shute, 5. Burr. 2611. Rex v. Abbot, Cowp. 832.

THE

THE COURT were of opinion, that it did not appear on the record, that the other *signed, sealed, or delivered* this bond; but admitting it did appear that he *signed and sealed* it, yet if it do not appear that he *delivered* it, it is the bond of the defendant alone, though another is named therein with him, for it is not his deed without the delivery.

CLARK
against
NICHOLSON.

Bostock *against* Bostock.

Case 169.

THE CASE, upon the master's report, was as follows: A bond was dated in the year 1706, conditioned for payment of a certain sum of money, and in the year 1709, one hundred pounds, part of the money, was paid; and by indorsement, reciting that there was thirty one pounds interest then due, it is expressed to be paid in discharge of the principal.

Money paid in
discharge of in-
terest.

The question was, Whether the thirty-one pounds interest then due, shall be taken to be part of the hundred pounds then paid? If it is, then so much interest is discharged, and by consequence so much continues part of the principal still, for which interest must be paid; whereas if the thirty-one pounds interest was not discharged, no interest would be due for it, because it is originally interest.

THE COURT seemed to incline, that the hundred pounds then paid should be in discharge of the interest then due, and for the residue in discharge of so much of the principal.

* Hawker *against* Hinton.

*[243]
Case 170.

UPON A WRIT OF ERROR of a judgment in the common pleas, the error assigned was, *a variance between the original and the declaration*; the one being "*Jemimman*," the other "*Jememman Force*."

Continuances
may be entered
at any time.

ON THE OTHER SIDE it was said, that the record was right; and upon producing it, so it was, but it was of another number-roll.

Then it was objected, that the original was "*anno 7 Georgii*," and the declaration was "*anno 9 Georgii*," and no continuances entered between the one and the other.

TO WHICH it was answered, that the continuances might be entered at any time, and that when entered the plaintiff is intitled to his judgment.

THE COURT was of opinion, that the attorney ought to be punished for making up a second record, but that the plaintiff must have his judgment.

Case 171.

Crowther *against* Wheat.

A writ altered
after it is sealed,
this is a great
misdemeanor.

SCIRE FACIAS was brought against the bail, and their attorney demanded *oyer* of the writ, and saw many rasures and interlineations in it, and for that reason he did not make any defence :

But now moved the Court, that all the proceedings thereon might be quashed.

See 6. Mod. 310.

THE COURT was of opinion, that this was no ground to quash the proceedings ; for if any alteration was made in a thing immaterial after the sealing the writ, there is no harm done ; and if in any thing material before the writ was sealed, yet that will not vitiate it ; so the Court would not quash it, or any proceedings thereon, but said, if the motion had been made against the clerk who rased it, and it appeared to be done after the writ was sealed, it is a misdemeanor, and punishable.

E A S T E R T E R M,

The Tenth of George the First,

I N

The Court of Exchequer.

Sir Robert Eyre, Knt. Chief Baron.

Sir Francis Page, Knt.

Sir Jeffery Gilbert, Knt.

} *Barons.*

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

* Anonymus.

* [244]
Case 172.

IN AN ACTION OF DEBT against the sheriff the case was thus :
A. by his last will and testament made *B.* his executor, and died. The executor proved the will before the commissary of the bishop of *Litchfield*; and as executor of *A.* brought an action against *C.* and obtained a verdict and judgment, and thereupon *C.* was taken in execution upon a *capias ad satisfaciendum*, and committed, and afterwards escaped. Then *B.* the executor died intestate, and *D.* took out administration with the will annexed, *de bonis non* of *A.* in the diocese of *Litchfield*, and brought this action of debt against the sheriff for this escape.

An administration *de bonis non* granted in the diocese of *Litchfield*, will not support an action for an escape on a judgment entered up in *Middlesex*.

5. Co. 30.
Moor, 145.
1. Salk. 40.
6 Mod. 134.
1. Com. Dg.
" Administration
" tion" (B. 5.)

The defendant demurred, for that the judgment being the foundation of this action, and that being entered in *Middlesex*, the plaintiff could have no right to it by virtue of an administration taken in the diocese of *Litchfield*, which, as to this demand, was void, for he ought to have a prerogative administration.

But THE COUNSEL for the plaintiff insisted, that this action would lie for two reasons :

FIRST,

ANONYMOUS. FIRST, Because the escape, which was in the diocese of *Litchfield*, was the principal and immediate cause of the action, and the judgment set forth in the declaration was only an inducement to it.

SECONDLY, That it was not in the power of the executor to alter the condition of his testator, so as to put the administrator to take out a prerogative administration; for he took it *cum testamento annexato*; so he should have it in the same condition it was in at the death of the testator; and ONE OF THE BARONS was of that opinion.

BUT THREE OF THE BARONS, of which EYRE, *Chief Baron*, was one, were of opinion, that the plaintiff could not maintain this action without taking out a prerogative administration, or an administration where the judgment was entered, and that was in the diocese of *London*; that it was absolutely necessary he must take out administration somewhere, and that there could be no inconveniency in taking out administration above, according to the case of *Byron v. Byron* (a), where it was held, that a man dying in one diocese, and having a bond in another diocese, in such case there must be a prerogative administration, because the debt doth not follow the person, * but it is a debt where the bond is at the time of the decease of the intestate. So in the case of *Adams v. Savage* (b) it was held, that administration granted by the arch-deacon of *Dorset* could be no title to a judgment in any of the courts at *Westminster*. It is true, a will of a personal estate which lies in a foreign country, and none in *England*, may be proved in that country where the estate is (c), and need not be proved here.

(a) Cro. Eliz. (472). pl. 25.

(c) *Jauhecy v. Sealey*, 1. Vern. 397.

(b) 6 Mod. 136. S. C. 1. Salk. 40.

2. Ld. Ray. 854. 1253.

E A S T E R T E R M,

The Tenth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir John Fortescue Aland, Knt. } *Justices.*

Sir Robert Raymond, Knt.

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

The King *against* Burridge,

Case 178.

Wednesday, 10 June 1724.

A RULE OF COURT was made by consent, that the sheriff of the county of *Devon* should bring the freeholders book before the master of the office, and that he should return *forty-eight* men, and that each of the parties should be at liberty to strike out *twelve*, and that the master shall appoint the *twenty-four* remaining to be returned by the sheriff to try the issue joined between the parties.

This rule was made by consent.

Afterwards, when the parties attended the master, the defendant struck out some *hundredors*, and at the trial he challenged THE ARRAY for want of *hundredors*; and the judge of assize allowed the challenge, and directed, that the plaintiff in the action might take what remedy he could by law.

It was now moved for an attachment against the defendant, for that this challenge to THE ARRAY was a breach of the rule of court, and a contempt thereof.

If it is a contempt of court, punishable by attachment, although the Judge at the trial allow the challenge.
S. C. 2. Ld. Ray. 1764. S. C. 2. Stra. 593. Ante, 186. Andr. 32. 2. Stra. 1000.

THE KING
vs.
BURKIDGE.

* [246]

IT WAS ARGUED *for him*; that his entering into this rule did not take from him the liberty of challenging the jury; if it did, it must be by implication, which could never be a good foundation for an attachment; for the cause to issue out an attachment should be as certain as the cause to warrant a judgment, and there was never yet an attachment granted in such a case. There are rules where there was an express injunction not to challenge; as in *Dunster's Case* in the tenth year of *Queen Elizabeth*, in which rule it was ordered, *quod nulla sit calumnia de utraque parte pannello*; and there are other rules where it was insisted on, but denied, as in the case of *The King v. Kiffin* (a), where a rule was made, as in this case, for striking a special jury, and JONES, *Attorney-General*, moved, that it might be inserted in the rule, that neither of the parties should be at liberty to challenge THE ARRAY, but it was denied PER TOTAM CURIAM, for it could not be granted but by consent; and it was not at that time pretended, that * this was implied in the rule, for if it had, he need not have moved the Court that it might be expressed. In the case of *The King v. Sherard*, in the first year of *George the First* (b), these words were added to the like rule, by consent of both parties, *quod nullum advantagium capiatur pro defectu hundredor* (c). But admitting this was implied by the rule, yet the defendant cannot be said to be guilty of a contempt for challenging THE ARRAY, for it is no more than an inadvertency, or a mistake of the sense and meaning of the rule. Now the different ways of drawing up these rules shew, that there must be an express consent of the parties not to challenge, otherwise no attachment will lie for challenging, neither will such consent take away any legal objection the party has to challenge; and if such a rule, as in the principal case, would serve, what reason can be given why an express consent should be put in so many rules for striking special juries?

Judgment given
by a Judge of
assize after he
came to town.

BESIDES, this matter hath received judgment already, for the rule was produced at the assizes, and pleaded in bar to this challenge, and the defendant demurred to it, and the plaintiff joined in demurrer; and when the Judge came to town, he gave judgment for the defendant.

At which THE CHIEF JUSTICE seemed to be surprized, that a Judge should give judgment after he came to town.

But THE COUNSEL *for the defendant* said he might, when it was by the consent of the parties; as where a verdict is found, and the Judge takes time to consider what judgment to pronounce, or what fine to set. And for these reasons it was insisted, that no attachment should go.

IT WAS INSISTED *for the attachment*, that this challenge was a contempt to the Court, and a breach of their rule, for that was, that THE MASTER should appoint twenty-four to be returned by

(a) Easter Term, 29. Car. 2. 3. Keb.

(b)

740

(c) 2. Roll. Rep. 365.

the sheriff to try the issue ; now this challenge to THE ARRAY destroyed this rule, for it was a *superseas* of the whole return ; like a rule of court or bond to stand to an award ; yet if the party retract the submission, it is a breach of such rule, and a forfeiture of the bond, both which are implied in the submission, for *qui admitt medium destruit finem*. The defendant might have taken a challenge to THE POLLS, but he knew that would be supplied by *talesmen* ; therefore to make all sure, and to prevent the trial, he took a challenge to THE ARRAY for want of hundredors, and this with an air of insolence, after he had been summoned to appear before THE CHIEF JUSTICE of this court, and had his opinion, that he (the defendant) could not strike out all the hundredors. For which reasons it was insisted, that the attachment might issue.

THE KING
against
BURRIDGE.

* [247]

THE COURT was of opinion, that the defendant was guilty of a premeditated contempt, because his challenge, drawn up in form, and arraigned at the assizes, shews his design was to put off the trial.

As to the rule made in this case, it may be without the consent of the parties, as well where the trial is by *nisi prius* as at bar, and that likewise in criminal cases as well as civil, and without any infringement of the liberty of the subject, but rather for the sake of justice, and to preserve their liberties ; and if such challenges are good, these rules would be avoided and made useless, which is a contempt of this Court ; and the case cited of *The King v. Kiffin*, to shew that the party may challenge, if it be not expressly prohibited in the rule, is (a) wrong ; for though it be not expressed, yet if it be necessarily implied, the power of challenging is taken away ; for otherwise these rules would be to little purpose. Now this rule is, that the issue shall be tried *per residuum juratorum*, but challenging THE ARRAY is as much as to say, it shall not be tried by that jury, and that the sheriff ought not to return them, when he was bound by the rule to return those, and no other. Now, as the Court has a power to enforce obedience to their own rules, it is but reasonable they should punish those who break them.

So the rule was made absolute for an attachment.

AFTERWARDS the defendant *Burridge* gave bail on the attachment, and *Mr. Crews*, who was his attorney and under-sheriff, was one of the bail.

The prosecutor then moved, that the high-sheriff might return the jury to try this cause, because the under-sheriff, who has *retorna brevium*, was attorney in the cause and bail on the attachment.

(a) They did not say that that case was wrong resolved, but that it did not prove what it was cited for ; they agreed, that if it was not expressed it was implied. *PART*, Chief Justice, said, that but two

precedents had been quoted which had such clauses ; he said, that upon search they found the rules of B. R. to have been so. — NOTE to former edition.

THE KING
against
BURRIDGE.

* [248]

And a motion being^c made for a special jury, and a question being put, Whether that could be granted without the consent of the parties? THE MASTER of the office was ordered to search for precedents; and he reported, that above thirty years ago there were several precedents for special juries upon trials for *nisi prius*, without the consent of * the parties; but that in the last thirty years there were several motions made for that purpose, but always denied.

THE CHIEF JUSTICE answered, that if the Court could once grant motions for special juries, without the consent of the parties, to try causes at the assizes, as it appears by the precedents they might; it was discretionary in the Court, whether to grant such motions, or not; for though it was often denied, it cannot be inferred from thence but that the Court may still do it, where it seems reasonable for them so to do.

BUT THE OTHER THREE JUDGES were of another opinion, because the sheriff is the proper officer to return juries; and if there is no legal exception against him, the Court cannot slip him, and order another to strike a special jury, without the consent of the parties, to try an issue at the assizes; but if there is any lawful objection against him, and it appear to be so upon affidavit made, then a special jury may be struck by the master of the office, without the consent of the parties: now, all that was shewn in this case why there should be a special jury was, that the defendant made affidavit that he feared he could not have a fair trial without such a jury (a).

Then it was offered as a reason why there should be a special jury to try this cause at the next assizes, because such a jury was thought requisite to try it at the last assizes.

BUT THREE OF THE JUDGES were of opinion, that a special jury might be granted to try a cause at BAR without the consent of the parties, but never at the *nisi prius*, unless very good cause was shewed, and that the cause now shewed was not sufficient; therefore since the high-sheriff is the proper officer to return juries, and there is no imputation against him (as there was not in this case), the Court would not vary from him without the consent of the parties.

So he was ordered to return this jury.

And in the same Term, there was another motion for a special jury in the case of *Goodright v. Mist*; and the like rule was made.

(a) But now by 3. Geo. 2. c. 25. either party is intitled, upon motion, to have a special jury struck upon the trial of any issue, as well at the assizes as at bar, and as well in indictments and informations for *misdemeanors* as in civil actions. But

the party applying for such special jury must pay the extraordinary expence, unless the Judge, in pursuance of 24. Geo. 2. c. 18. certifies that such special jury was necessary.

E A S T E R T E R M,

The Tenth of George the First,

A T

The Old Bailey,

BEFORE

Sir Jeffery Gilbert, *Knt. Chief Baron*

O F

THE COURT OF EXCHEQUER.

Anonymous.

Case 179.

AT A SESSIONS of *oyer and terminer* held at THE OLD BAILEY in *April* last this case happened : Indictment for stealing the goods of an unknown person.

A loose and idle person was apprehended at *Southampton*, and being brought before a justice of peace, a silver tankard was * found in his possession, and he giving no satisfactory account how he came by it, and the justice suspecting he stole it, committed him to prison. * [249]

Being brought by *habeas corpus* to NEWGATE, he was indicted for stealing a silver tankard, value ten pounds, of the goods and chattels of a *person unknown*.

At the trial the prosecutor offered to give evidence, that this was a loose and disorderly person, and therefore it must be presumed that he could have no property in the tankard, but that he stole it.

But GILBERT, *Chief Baron*, who was then in court, said, that though an indictment might be good for stealing the goods *cujusdam ignoti*, yet a property must be proved in somebody at the trial, otherwise it shall be presumed that the property was in the prisoner, by his pleading "*not guilty*" to the indictment ; for a man shall not be found guilty of felony, and hanged upon presumption. LORD CHIEF JUSTICE HALE said, that he would never convict any person for stealing the goods *cujusdam ignoti*, merely because he would not give an account how he came by them, unless there were due proof made, that a felony was committed of these goods. 2. Hale's Hist. Pl. Cr. 290.

E A S T E R T E R M,

The Tenth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt.

} *Justices.*

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Sir Walter Baggott against Oughton.

Case 180.

UPON A CASE stated, and referred out of the court of chancery for the judgment of this Court, it was thus :

Sir Edward Baggott, the father of the plaintiff, upon his marriage with his wife, the plaintiff's mother, in consideration of that marriage, and of a considerable sum of money which he was to have with her as a marriage-portion, which could not be raised otherwise than by selling her father's estate, she being the only child of the family, and *Sir Edward*, for that reason, being unwilling that the estate should be sold, agreed by indenture made between them, that A FINE should be levied of the lands, and the uses thereof declared to *Sir Edward* for life, then to the use of his wife for life, remainder to the plaintiff in tail, &c. reversion in fee to *Lady Baggott*; in which settlement there was A PROVISIO, that *Lady Baggott* should have power to charge the whole estate with the payment of five hundred pounds to any person to whom she should give the same; and with a farther power, that any person who should be actually seised of the lands by virtue of this settlement, might make " a lease or leases for three lives, or for twenty-
" one years, of all or any part of the premises in the indenture or
" fine comprized at such yearly rents, or more, as the same were

Under a power, in a family settlement, to make leases of the premises, reserving the ancient rent, lands always occupied with the family-seat cannot be demised. S. C. post. 381. S. C. Fort. 332. S. C. 1. Peer. Wms. 347. 1. Vezey, 51. 2. Peer. Wms. 659. 2. Bro. Cases Ch. 104. 153. 3. Bro. Chan. Caf. 211. 548. 4. Bro. Chan. Caf. 45.

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" then let at." * *Sir Edward Baggott* died, and *Lady Baggott*, being the next in remainder for life, entered, and afterwards married *Sir Adolphus Oughton* (the now defendant), and then made a lease to him of the *capital messuage* for twenty-one years, but reserved no rent; and about a month afterwards she died.

The single question now before the Court for their opinion was, Whether this was a good lease?

IT WAS ARGUED *for the plaintiff*, that it was not, because this capital messuage being never yet let, by consequence there was no rent reserved at the time of making this settlement, therefore this power can never be pursued; and for this *Lord Mountjoy's Case (a)* was cited as an authority in point, which was thus: A tenant in tail, with a power to make leases, &c. reserving the ancient rent, made a lease of two distinct farms, reserving the ancient rents out of both the farms in one entire sum; this was adjudged a new rent, and not the old accustomed rent; and that if he reserve a less sum than the accustomed rent, the lease is void. So in *Fitzwilliams's Case (b)* it was resolved, that a power by which the interest of a stranger shall be charged must be taken strictly, as a power to make leases for twenty-one years; and he who has such a power cannot make a lease for twenty-one years to commence *in futuro*. The power in the principal case reserved to make leases was intended for the benefit of the family, *viz.* to make leases of such lands which had been actually, anciently, and usually let; and though it was indefinitely to "make leases of all, or any" part of the premises comprized in the indenture of fine, yet these words are restrained, in the latter part of the sentence, to such leases where the yearly rents or more were reserved, "as the same were let at when the settlement was made;" and the authorities in the margin were cited (c), to prove, that general words in a deed are to be qualified and restrained by particular and subsequent words in the same clause. It is true, this lady had an interest coupled with her power, but her interest in respect to any charge to affect the remainder-man is entirely void; for this lease, as to him, must arise out of her power, and is no more than if made by an attorney. Now, supposing she had made a lease of lands not in possession, such lease would have been absolutely void; neither shall a lease, without rent reserved, * be good to charge the plaintiff, who is the remainder-man. Besides, *Sir Walter Baggott* (the now plaintiff) is a purchaser of this estate under the said settlement, and is heir at law both to *Sir Edward* and the lady, to whom this power was reserved; and all powers given to tenants for life shall be strictly construed, because they make the estate to continue as a charge on those in remainder (d); therefore the

(a) 5 Co. 5.

(b) 6. Co. 32.

(c) Moor, 832. 1. Roll. Rep. 375.

2. Roll. Rep. 278. 3. Rep. 154. Hob.

275. Litt. Rep. 345. 1. Jones, 22. 26.

3. Lev. 274. Shower, 150.

(d) 8. Co. 70. 2. Cro. 318. 458.

1. Roll. 12. Palm. 104. 3. Mod. 378.

Salk. 537.

Easter Term, 10. Geo. 1. In B. R.

words, "to make leases, &c. at such yearly rents, or more, as the same were then let," must restrain this power to make leases only of such lands which were let at that time.

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ON THE OTHER SIDE it was argued for the defendant, that this was a good lease, and well warranted by the power, which is, for the tenant in possession to make leases "of all or any part of the lands comprized in the indenture or fine, &c." Now if the power had rested there, this lease had been certainly good, and nothing could be objected to make it otherwise. But it has been said, that the subsequent words, "to make leases at such yearly rents as the same were let at that time," restrains this power to lands which were then let; and this capital messuage being never let, this power can never extend to it. But these subsequent words are only explanatory of the first part of the sentence, "that the lands usually let may be leased at the usual rent:" now, by the first part of THE PROVISIO, the tenant in possession had power to make leases "of all or any part of the lands comprized in the settlement;" and the subsequent part of the clause shall not control that power without negative words, and there are no such words in this case. Besides, this power is reserved to Lady Baggott, who had the inheritance of these lands, and from whom all the estates in the settlement moved; and it is not a power super-added to the estate of a third person, and therefore shall have a very favourable construction (a). As to *Lord Mountjoy's Case* (b), there are some points resolved which have since been denied to be law; and in 2. Roll. Abr. 262. there is a contrary resolution; but the case of *Walker v. Wakeman* is full in point (c): It was a conveyance of lands and a rectory to the use of T. S. for life, with a power to make a lease of the premises, "or of any part thereof, so as five shillings rent was reserved for every acre of land;" the tenant for life made a lease of the rectory, reserving a rent; now this not being land, but consisting in tithes, the question was, Whether this lease was warranted by that power? and it was adjudged that it was, because the restrictive clause was in the affirmative, and shall not restrain the general words in the preceding part of the sentence; it is true, Chief Justice HALE said, that if this had been *res integra* he should have been of another opinion. The construction of powers is various, according to the intent of those by whom they were created, for sometimes they are construed liberally, and sometimes very strictly; but the power in the principal case being reserved to her who had the inheritance of the estate originally before the settlement was made, is part of her old dominion; and where the execution of such a power is agreeable to the intention of the donor, and consistent with his will at the time it was created, it must have a very liberal and favourable construction; and this was the concurrent opinion of the court of chancery in the last Term, assisted by the MASTER OF THE ROLLS, and by GILBERT and PRICE, Barons, in *Lord Coventry's Case* (d).

* [252]

(a) 1. Vent. 350.

(b) 1. And. 307.

(c) 1. Vent. 294. 2. Lev. 150.

(d) 2. Peer. Wms. 222. 1. Stra. 596.

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TO WHICH *it was answered*, that it is not material whether the estate moved from *Lady Baggott*, as being her inheritance before this settlement was made, because the Court will judge of this power as it appears upon the face of that settlement. It is true, there are no negative words simply in the subsequent part of this clause to control the power given in the precedent part; but there are restrictive words, which imply a negative, and restrain the tenant from overcharging the reversioner. It is to be observed, that *Chief Justice VAUGHAN*, in delivering the opinion of the Court in a case reported by him (*a*), said, that where power is given to make leases of lands for twenty-one years, reserving the rents which were thereon reserved at the time of the making the deed, that in such case the lands demisable by that power must be lands then in lease, on which some rent is reserved.

THE COURT was unanimous of that opinion for the plaintiff in this case.

After the death of PRATT, *Chief Justice*, this cause came on once more, in *Hilary Term*, the twelfth of *George the First*, to be argued.

THE WHOLE COURT was of opinion, that the lease of the mansion-house and gardens was void (*b*).—This opinion was, on argument, affirmed by THE CHANCELLOR, and by him decreed accordingly; and that decree affirmed in THE HOUSE OF LORDS, on appeal (*c*).

(*a*) Vaugh. 35.

(*b*) It appears by the Register's book, that the Judges of the court of king's bench certified their opinion in this case, Reg. lib. A. 1716. fo. 438.; but the

certificate has been lost, and no decree can be found. See Dougl. 569.

(*c*) See *Pomeroy v. Partington*, 3. Term Rep. 665.; *Goodtitle v. Funcian*, Dougl. 567.

TRINITY TERM,

The Tenth of George the First,

I N

The King's Bench.

1725.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt.

} *Justices,*

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

* [253]

* *Shaw against Way.*

Case 181.

IN A SPECIAL VERDICT in ejectment the case was thus : *Thomas Ravenscroft* being seised in fee of lands, &c. in the parish of *Hawarden*, in the county of *Flint*, did, by his last will, devise the same to *Dorothy* his wife for life; and farther, he devised to his said wife the sum of five hundred pounds, "to be raised by her, or by her executors, &c. by sale of timber-trees, or by sale of any part of the lands, or by digging, sinking, getting, and sale of coals on the premises, &c. at her choice, or at the election of her executors; and that if his said wife should die before the said sum of five hundred pounds was raised, then he gave her power, either by deed or will, in her life-time, to appoint any person to raise the same after her death, in manner as aforesaid; but if either of his sisters, *Anne Lunsford* or *Dorothy Evatt*, or the trustees named in his will, shall pay unto his said wife, or to her executors, &c. the said sum of five hundred pounds, then the power of selling timber, &c. shall cease." And after the decease of his said wife, he devised the said lands to

Where a man may have a fee-simple by devise without the word *heirs*; and where the devisees take an estate for life with contingent remainders, &c. S. C. post. 382.

S. C. 1. Eq. Caf. Abr. 184.
S. C. Fitzg. 7.
S. C. 2. Stra. 798.
S. C. Fortesc. 58.
S. C. 3. Danv. 178.
S. C. Bar. K. B. 54. Fortesc. Rep. 158. Barnard. K. B. 54. cited in Andr. 339. 1. Com. Dig. "Devise" (N. 6.). (N. 7.).

Francis

SHAW
against
WAY.

* [254]

Francis Bramston, Serjeant at Law, Charles Nott, and Edward Parry, and “to the survivor and survivors of them (a), (subject to the raising the five hundred pounds) upon trust for his said sisters, equally between them during their lives, without committing any waste; and that if they happen to die leaving issue or issues of their bodies, then in trust, that the mother’s share shall be for such issue or issues, or else in * trust for the survivor or survivors of them, and their respective issue or issues; and that if both his said sisters should die without issue, or having issue such issue shall die without issue, then the said trustees shall stand and be entrusted for *John Swift*, and the heirs males of his body; and for want of such issue, then in trust for *Ravenscroft Gifford*, and the heirs males of his body;” with several remainders over.

THE JURY find, that *Thomas Ravenscroft* died seised of the premises without issue, and that *Dorothy* his widow survived and entered, and died seised; that after her death *Anne Lunsford* and *Dorothy Evatt* entered, and were seised; that *Anne Lunsford* died, never having any issue; that *Dorothy Evatt* survived; and that after the death of the said *Anne*, she entered on the whole, and was thereof seised, and levied a fine at the grand sessions in *Flintshire*, in the fourth year of *James the Second*, of the premises, by the name of “four messuages, &c.” and declared the uses thereof to *Thomas Williams* and his heirs, until a common recovery should be had, &c.; and that in the same year a common recovery was suffered in the said court, and the uses thereof declared to the said *Dorothy Evatt*, her heirs and assigns for ever. They farther find, that the said *Dorothy Evatt* was heir at law to the testator, and that *John Swift* was dead without issue; that *Ravenscroft Gifford*, in the year 1693, and in the life-time of the said *Dorothy Evatt* and *John Swift*, went beyond sea, and there continued twenty-six years, until the year 1719; that the said *Francis Bramston* and *Charles Nott* died in the life-time of *Edward Parry*; that the said *Dorothy Evatt* died in the year 1698, without issue, and that she never had any issue of her body; that the said *Ravenscroft Gifford* entered and was seised; and being so seised, he demised the lands to *William Shaw*, the plaintiff, in the fifth year of *George the First*, for seven years, by virtue of which demise he entered and was possessed, until he was ejected by the defendant; and so they make a general conclusion.

THIS CASE came before the Court by writ of error from THE GRAND SESSIONS of *Wales*, where judgment was given for the defendant.

THE COUNSEL for the plaintiff made these questions :

FIRST, What estate the trustees took by this will? What estate the two sisters had? i. e.

(a) But did not say to their heirs.

SECONDLY,

* SECONDLY, Whether the two sisters took an estate for life in common, or an estate-tail ?

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THIRDLY, Whether judgment ought to be given for the plaintiff for a moiety, no cross-remainders being limited by the will to the sisters ?

AS TO THE FIRST POINT *it was argued*, that the trustees had a fee-simple, though the devise was not expressly to them and their heirs ; for if they should have a less estate, it would not support the trusts which were afterwards limited in this will ; so that the intent of the testator would not be completed, because the several devises afterwards made must arise out of the estate devised to them. And though in *feoffments* or *grants* the word " heirs " is necessary to raise a fee, yet it is otherwise in *wills*, for there any words which shew that the testator intended to pass a fee will be sufficient to make it so : as for instance ; a devise of lands to T. S. for ever ; so a (a) devise of lands to his wife for life, remainder to his eldest son, paying to his brothers and sisters forty shillings a-piece ; here was no estate devised to the eldest son, but the word " paying " made it a fee-simple.

So a devise to his son, paying three pounds *per annum* to his brother, was adjudged a fee-simple in the son, because the charge to his brother might survive and continue after the death of the devisee ; and so it is in all cases where the word " paying " is collateral, (*i. e.*) where it is not said " out of the (b) profits of the "land:" so a devise of all his real estate passes a fee, because the word " estate " being *genus generalissimum* comprehends the whole, both real and personal ; and the words (c) " all my estate " are a description of the fee : so on a devise of all his lands of inheritance, if the law will permit, it was adjudged that a (d) fee passed.

So where the testator was seised in fee, and devised four coats to four poor boys of the parish of C. for ever, and all his lands to his wife *Margaret*, and her assigns ; it was adjudged, that (e) *Margaret* had a fee-simple, because she took the lands with a perpetual charge.

So in the principal case it plainly appears, that the testator intended the trusts appointed in his will should be supported ; * and * [256] if that cannot be done but by an estate in fee, the trustees must necessarily have such an estate ; and if they took a fee-simple, then the trusts are executed by the statute of Uses, and then *Ravencroft Gifford* (the lessor of the plaintiff) had an estate-tail executed in him.

(a) *Willock v. Hammond*, Cro. Eliz. 204. pl. 39. 3. Rep. 20. 21. a. S. C. *Spicer v. Spicer*, Godb. 280. Cro. Jac. 527. pl. 3. S. C. 2. Roll. Rep. 80. S. C.

(b) *Walker v. Collier*, Cro. Eliz. 378. pl. 29. 6. Rep. 16. a. S. C.

(c) *Countess of Bridgwater v. Duke of Bolton*, Salk. 236. pl. 15. 2. Ld. Raym. 968. Eq. Cas. Abr. 177. pl. 17. S. C. cited in 2. Wil. Rep. 524. by JERVELL,

Master of the Rolls, as a resolution given on great consideration, in which LORD CHANCELLOR COWPER, when of Counsel, discouraged a writ of error in parliament. S. C. cited by Talbot, Chan. Cas. temp. Talb. 162. Fortesc. Rep. 63.

(d) *Whitlock v. Harding*, Moor, 873. Godb. 207. Hob. 2. S. C. Roll. Abr. 835. S. C.

(e) *Smith v. Tindall*, 2. Salk. 685.

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Way.

THE SECOND and THE CHIEF QUESTION was, What estate the sisters took by this will? And as to that point it was argued, that they took an estate for life only, with contingent remainders in tail to their issues, and that it was the intention of the testator that they should have no larger an estate, because of that restriction in his will from committing waste; and an express power of digging coal; both which would have been implied if he had intended them an estate-tail; therefore these things are a sufficient indication of his intent to give them an estate for life only.

As to that clause, viz. "if either of them die leaving issue or issues of their bodies; then in trust, that the mother's share shall be for such issue or issues, or else in trust for the survivor or survivors of them;" this is a joint estate-tail to the issue, upon a contingency; for otherwise the word "survivors" would be inconsistent, because there were but two sisters, for there could be no survivors between two.

It is true, if the devise had been to them for life, and after their death to their issue, that would have been an estate-tail: as for instance; a devise to (a) Barnard for life, and after his decease to the issue of his body; this was adjudged an estate-tail.

But the case of *Loddington v. Kime* is in point, which was thus: A devise to his uncle "for life, without impeachment of waste, and if he hath issue male, then to such issue male and his heirs for ever, and if he die without issue male, then to his nephew in fee;" this was adjudged an estate for life in the uncle; for if the testator had intended an estate-tail, it had been impertinent to have added these words, "without impeachment of waste;" and the inheritance being veiled in the issue male and his heirs, these words "his heirs" make it certain what issue male was intended; then the subsequent clause, "if he die without issue," must be construed to relate to what went before, viz. "if he die without such issue then living who might take the inheritance as before directed by the will," for otherwise those words would make an estate-tail by implication, to destroy an express estate before limited to the issue male and his heirs; so in this case the will being, that if both his sisters die without issue, it must be intended issue then living, and capable of taking the inheritance.

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Besides, all the devises over being expressly in tail, shew, that the testator intended only an estate for life to his sisters.

As to THE THIRD POINT, Whether judgment should be given for the plaintiff for a moiety, if the Court should be of opinion that the sisters had an estate-tail; it was argued that it shall, because the sisters being tenants in common, in such case, after the death of either of them without issue, the remainder takes place immediately with respect to her moiety, and the word "survivors" must relate to their issue.

ON THE OTHER SIDE the first point was agreed, that the trustees took an estate in fee for the reasons before-mentioned; so it

(a) King v. Mellish, 2. Lev. 58. 801. 10. Mod. 403. Fitzgib. 15. 21.
1. Vent. 214. 3. Lev. 431. Loddington Fortesc. Rep. 67. 74.
v. Kime, Ld. Raym. 203. 209. a. Stra.

was chiefly argued upon THE SECOND POINT; (*viz.*) that the sisters took an estate-tail, with cross-remainder to their issue, which may be inferred from these words, "if either of my sisters happen to die leaving issue or issues of their bodies, and if both die without issue, then in trust for *Rhvencroft Gifford, &c.*"

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Now it is certain, that the word "issue" is as effectual to create an estate of inheritance as the words "heirs of the body;" it is mentioned in several statutes, and particularly in the statute *de Donis, &c.* and in the statute of (*a*) Wills; so as to the vesting and continuing of estates, it is the same, and as effectual as the words "heirs of the body;" and it is more comprehensive than a devise to one for life, and after his decease to his children, which was (*b*) *Wild's Case*: it is true, in that case it was held an estate for life in the devisee, because he had a son and a daughter then living; but if there had been none then living, this would have been an estate-tail; and so it must be in this case, and for the same reason, *viz.* because the sisters never had any issue.

So a devise to his wife for life, and afterwards to her son, and if he die without issue, having no son, remainder over; adjudged an estate-tail in the son. Moor, 127. Roll. Abr. 837. See 1. Vent. 230.

So in a late case in the exchequer, which was thus: *J. Sutton* devised his lands "to *Thomas Sutton* for life, remainder to his first son in tail, and if *Thomas Sutton* and his wife shall die without issue, remainder to charitable uses;" a bill was exhibited in the exchequer to establish this charity, and the defendant pleaded, that *Thomas Sutton* suffered a common recovery, and declared the uses to himself * and his heirs, which plea was allowed: it is true, that upon an appeal to the house of lords, the defendant was ordered to answer, but it was on the foot of being a devise to a charity; and though the testator might intend it for a charity, yet since by operation of law it was an estate-tail, that must be observed. Lev. 250. Sutton v. Sammon, Hil. 7. Geo. Fortesc. Rep. 66. Fitzgib. 13. 26.

* [258]

As to THE THIRD POINT, admitting this is an estate-tail in the sisters, then they will have cross-remainders by implication; and for this the case of (*c*) *Holmes v. Meynell* is an authority, in point: The testator devised his lands "to his two daughters and their heirs, equally to be divided between them, and if (*d*) they die without issue, then all his land to his nephew *Francis* in tail;" the youngest daughter died without issue: and it was adjudged, that the surviving sister shall have the whole by implication, for that the daughters had several estates-tail by moieties, and the survivor shall have the whole by way of cross-remainder, and *Francis* shall have nothing by implication, but must stay till both the daughters are dead without issue. Therefore if *Dorothy Evatt*, who survived her sister, had the whole estate by way of cross-remainder, she having suffered a common recovery, all the remainders over are barred thereby.

(a) 32. Hen. 8.

(b) 6. Rep. 16. Moor, 397.

(c) T. Raym. 452. T. Jo. 172.

(d) It is not said, if either of them die.

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v.
WEIGH.

Andr. 339.
2. Stra. 801.
Eq. Caf. Abr.
185. pl. 29.
Fortesc. Rep.
66.
Fitzgib. 23.

It was admitted on the other side, that where there is a devise to one for life, and after his death to his issue, remainder over; this is an estate-tail; and so it was adjudged in *Melling's Case*; which does not differ from the present case; for here the devise was to his sisters for life, and if they die without issue, remainder over; so that in the one case a remainder is limited after a dying without issue, and in the other case it was limited if they die without issue. So in the case of *Langley v. Baldwin*, which was referred out of chancery to the Judges of the common pleas for their opinion, which was thus: The testator devised his lands to *Jonathan Langley* for life, without impeachment of waste; remainder to *J. S.* his grandchild, for life, without impeachment of waste, with a power to him to make a jointure of the same land to any woman he should marry for her life; and after his death he devised the lands to the first son of *J. S.* the grandchild in tail, and so to the sixth son; and then devised, that if *J. S.* the grandchild should die without issue male, the land should remain to *J. B.*; and the question was, What estate *J. B.* took by the will? and it was certified by the court of common pleas that he took an estate-tail (a); which was decreed accordingly. As to the concomitant clauses, if the words in a will are sufficient to raise an estate-tail, these clauses, (*viz.*) with or without impeachment of waste, or any power to raise money, by cutting and selling timber, or otherwise, shall not control the devise.

* [259]. * As to the case of *Loddington v. Kime*, it comes near to the present case, but yet it is not an authority in point; for there the devise was to one for life; and if he hath issue male, then to such issue male and his heirs: now there the inheritance being vested in the issue male and his heirs, these words "his heirs" are a description of the person who is to take; but in the present case there is no description of the person who is to take as issue; therefore it must be such issue who is living at the time of the death of the sisters; and if so, then it is a proper limitation and not a purchase; and the rather, because the devise is expressly to the sisters for life, and to their issue only on a contingency; but if it had been to them for life, and that if they die without issue, remainder over, that would be an estate-tail; and all the cases cited on the other side prove no more. As for the concomitant clauses in this will, "with or without impeachment of waste, or a power to raise money by sale of timber, &c." it hath been objected, that they are only directory, and shall not control the granting part of the will, which is very true; but where the devise is to be collected from the intention of the testator, and to be supported only by implication, certainly those clauses are good to explain what the testator intended.

(a) NOTE, By *RAYMOND*, Chief Justice, in the case of *Shaw v. Weigh*, an estate-tail was raised here by implication, because the express devise was not to all the sons; for if there had been more than

six, and the six dead, must the heir at law have it before a seventh son? Eq. Caf. Abr. 185. pl. 29. Fitzgib. 26. Fortesc. Rep. 79. 2. Stra. 805.

As to THE THIRD POINT, viz. if the sisters have an estate-tail, then whether cross-remainders are limited to them by this will; this question entirely depends on these words, "the survivor or survivors of them." The clause is, "if his sisters die leaving issue of their bodies, then the mother's share shall be for such issue or issues, or else for the survivor or survivors of them:" now it was argued, that the word "survivors" must of necessity relate to the issue; for otherwise it would be inconsistent, because there being but two sisters, it is impossible it should relate to them, for there can be no survivors between two; therefore it must relate to the issue; and if so, the sisters took no estate by cross-remainders; therefore judgment ought to be for the plaintiff in error for a moiety.

It was held clearly by THE COURT, as to THE FIRST POINT, that the trustees had a fee-simple; for where it appears upon the face of the will, that the testator intended to give such an estate by necessary implication, as by limiting such trusts which could not be supported, unless the trustees had a (a) fee-simple, in such case a fee shall pass to them, and that the trusts were executed by the statute of Uses.

* As to the SECOND POINT, which was the chief point, THE * [260] CHIEF JUSTICE was of opinion, that this was not a contingent remainder in tail to the issue of the sisters, and that a limitation to the issue does not differ from a limitation to the heirs of the body. It is true, it has been held, that where an express estate for life is devised, in such case no subsequent words shall create an estate-tail by implication; but this is an old antiquated and exploded opinion, and contrary to the later authorities; and in this case the subsequent words, "without committing waste," do not control the devise.

It is true, where an estate for life is devised to one, with a provision immediately for all his sons successively, and if he die without issue, remainder over, in such case the devisee has but an estate for life, because these words, "if he die without issue," shall be intended a dying without such issue as are expressed in the will; and upon this distinction the case of (b) *Popham v. Bamfield* was adjudged; for there is a great difference between a devise to T. S. for life, and if he die without issue, remainder over, and a devise to T. S. (without expressing for what estate), and if he die without issue, remainder over.

As to THE THIRD POINT, they all agreed, that if the sisters took an estate-tail, then they had cross-remainders by implication; for the subsequent words being, "if both die without issue, or, having issue, such issue die without issue, remainder over," this remainder was not to be executed until both sisters died without issue. They allowed that cross-remainders would not rise to more than two by implication; but in this case there were but two sisters, so such remainders may very well rise to them.

(a) Roll. Abr. 611.

(b) Salk. 236. pl. 14. Eq. Cas. Abr. 108. pl. 2. Fortesc. Rep. 69. Vern.

79. pl. 167. Ld. Raym. says, this case is mis-reported in Salk. Fortesc. Rep. 80. Fitzgib. 26.

Draw
against
WAT.

This was the opinion of THE COURT upon the first argument, but no judgment was given, for they took time to consider, and ordered a second argument.

And afterwards, in *Easter Term*, in the eleventh year of *George the First*, it was argued again.

THE COUNSEL for the plaintiff in error insisted, that the sisters had only an estate for life; and this depended upon such construction as the Court should make of the word "issue," which is no legal word of limitation; therefore it cannot be a limitation in a will otherwise than by intendment; and if so, then it must be shewn on the other side that the testator intended it as a limitation; and in the case of *King v. Melling* before-mentioned, the argument of the Lord Chief Justice HALE was founded on the intent of the testator; but in * that case it was necessary to give a power to make a jointure, in order to continue the estate-tail undestroyed.

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Now in the principal case, there being an express estate devised to the sisters for life, those concomitant clauses, viz. the giving them power to raise five hundred pounds by digging coal or selling timber, and restraining them from committing waste, shew, that the testator intended they should have an estate for life only; for if he had intended an estate-tail, such a power and such a restriction had been impertinent and void; so that taking the whole matter together, it shews that the testator did not want advice in making this will; therefore it ought not to have so liberal a construction as otherwise it would, if there had been no such clauses to lead the judgment of the Court, and to explain the intention of the testator. A devise to his son for life, *et non aliter*, and to his sons, was adjudged an estate for life only in the son. So in the case of *Backhouse v. Wells*, in the ninth year of *Queen Anne*, a devise to T. S. for life only, without impeachment of waste, and if he died leaving issue, then to such issue and the heirs of such issue, was adjudged an estate for life only. It is manifest, that the words "issue or issues" in a will may be words either of limitation or of purchase; but in this will, the words being, "if the sisters die leaving issue of their bodies, then in trust for such issue or issues, or else for the survivor or survivors of them;" there the word "survivors" shews, that the testator intended the words "issue or issues" to be words of purchase, because that word must necessarily relate to the word "issue," and then the sentence would be thus, "in trust for the issue or issues, and the survivors of them;" it could not be in trust for the sisters and the survivors of them, because there were two and no more, and there can be no survivors between two.

Then (a) *Hilly and Taylor's Case* was cited, which is reported in *Cro. Eliz.* by the name of (b) *Clerke v. Day*, which was thus, viz. The husband devised the lands to his wife for life; and that if she married after his decease, and had any heirs of her body, then after her decease that heir should have it, and the heir of the body

(a) Owen, 143.

(b) *Cro. Eliz.* 323. pl. 5. *Moer*, 593. *Roll. Abr.* 832. K. *Fitzgib.* 24.

of such heir; and if she died without issue, remainder over; and it was adjudged, that the wife had only an estate for life, because the words "if she die without issue" being grafted on the word "heir," do plainly shew, that the word "heir" was used as a designation of the person, and not as a limitation of the estate; and that * immediately upon the death of the wife, the inheritance vested in the heir by purchase.

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* [262]

IT WAS ARGUED *for the defendant in error*, that the sisters were tenants in common in tail general, because the words equally to be divided make a tenancy in common in a will: as for instance; where a devise was to his three sons and their heirs, and to the longest liver of them, to be equally divided between them, &c. it was adjudged, that this last clause made them tenants in common: and here the devise was to his sisters "equally between them during their lives; and if they die leaving issue or issues of their bodies, then to such issue or issues;" which word "issue" is as proper a word in a will to create an estate-tail as the words "heirs of the body" are in a deed; and it is the only word in the statute *de Donis* to describe the heirs of the body, viz. where lands are given to one and the heirs of his body, upon condition that if he die without issue the lands shall revert to the donor, the donee after issue had power to disinherit the issue, &c. therefore if the word "issue" be equivalent with "the heirs of the body," it certainly makes an estate-tail. And so is *Sunday's Case* (a): A devise to his wife for life, and after her decease to his son William, and if he marry and has issue male, then his son to have it; and if he has no issue male lawfully begotten on his body, then to Samuel in like manner; and if any of his sons, or their heirs males, issue of their bodies, go about to alien, then the next heir to enjoy it: William suffered a common recovery, and declared the uses to himself and his heirs; and it was adjudged good, because he had an estate-tail; for these words, "if he hath no issue male," make an estate-tail, which in this case was farther enforced by the subsequent words, "if they go about to alien," which had been impertinent if an estate for life had been intended, because in such case they could not alien.

Blesset v. Cam-
well, 3. Lev.
373.

Westm. 2. c. 1.
anno 13. Edw. 1

As to THE THIRD POINT, that the plaintiff in error ought to recover for a moiety, because one of the sisters, viz. Anne Lunsford, had done no act to prejudice him, and that the sisters did not take by cross-remainders; for such shall never be raised by (b) implication, but where there is an absolute necessity it should be done.

To WHICH it was answered, that the sisters took by cross-remainders by that clause, viz. "if both his sisters should die without issue," &c.: now upon the death of one, the whole is vested in the other by way of cross-remainder by * implication; and that *Ravenscroft Gifford* shall have nothing by implication till both the sisters are dead without issue, and without doing anything to bar the remainder.

* [263]

As to the FIRST and THIRD points, THE COURT was very clear in opinion, as they were upon the first argument; and as to THE THIRD

(a) 9. Rep. 127. *Sunday's Case*

(b) Cro. Jac. 655, pl. 6. *Gilbert v. Witty*.

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WAT.

POINT they held, that where an estate is limited to the heirs of the body, or to the issue of one upon the decease of another to whom it is expressly devised for life, this is an estate-tail, because the law supervenes the intent of the testator ; and this was the case of *King v. Melling*. But of late the courts have not gone so far as they did formerly to supervene the intent of testators, as in the case of *Backhouse v. Wells*, in chancery, in the LORD PARKER's time, which case differed from that of *King v. Melling* but in one word, which was the word *only* : as for instance ; *Melling's Case* was a devise to one for life, and after his decease, to the issue of his body by a second wife ; this was adjudged an estate-tail : and *Backhouse's Case* was, A devise to one for life *only*, and if he die without issue, remainder over ; this was adjudged an estate for life, because of the word *only*. Now in the present case, if the word "issue" is a limitation, it is an entail ; but if it be by way of description who shall take, it is but an estate for life ; and here the words are, "if the sisters happen to die, leaving issue or issues of their bodies, then in trust for such issue or issues ;" if the testator had rested there, and gone no farther, this had been a plain estate-tail ; but he goes farther, and says, "or else in trust for the survivor or survivors of them ;" which words shew, that the testator intended the word "issue" to be a word of purchase, and not of limitation, because the word "survivors" must relate to the word "issue," for there cannot be any survivors between two, and therefore it could never relate to the sisters ; and this was what made the doubt.

ONE OF THE JUDGES held it an estate only for life : he agreed, that the word "issue" in a will was a good word either of limitation or purchase, and that it was the intention of the testator which made it either the one or the other ; now in this case it seemed, that by the concomitant clauses the testator intended an estate for life to the two sisters, and no larger an estate ; and therefore to construe it an estate-tail would be to control the intention of the said testator.

TWO JUDGES were of opinion, that it was an estate-tail.

* [264] THE CHIEF JUSTICE doubted.

Case 182.

* The King against Pollard.

New trial was never granted in another Term, after the signing a judgment.

S. C. 2. Ld.
Ray. 1370.
S. C. 2. Sess.
Cases, 10.

THE DEFENDANT was found guilty as accessory to the buying and receiving of stolen goods.

It was moved to set aside the verdict, and to have a new trial granted, because *the principal* was since tried for the same fact, and acquitted, at THE OLD BAILEY.

It was argued, that where *the principal* is not guilty, *the accessory* cannot be guilty (*a*), especially in this case, he being found guilty

(*a*) Indictment for a misdemeanor in receiving stolen goods, knowing them to be stolen : it appeared in evidence, that the principal felons had been convicted and executed ; whereupon it was objected, that the indictment would not lie, being only given in case the principal felon could not be apprehended ; for sect. 6. begins,

" Provided always, that if, &c." which is only a jurisdiction given under those particular circumstances ; and of this opinion was PRATT, Chief Justice, and the defendant was acquitted. *The King v. Wild*, Sel. Cal. of Evid. 57.—NOTE to the former edition.

upon the testimony of the principal. The statute 5. *Anne*, c. 31. s. 5. & 6. enacts, "That it shall be lawful to prosecute persons buying and receiving stolen goods, knowing them to be stolen, as for a *misdemeanor*, and to punish them, by fine and imprisonment, though the principal felon be not before convicted. And if such principal felon cannot be taken, yet it shall be lawful to prosecute and punish any person knowingly buying goods stolen by such principal, &c." Now, by this statute, power is given to prosecute the accessory, but that is where the principal cannot be taken; now here he was not only taken, but appeared and gave evidence against the accessory; therefore the defendant moved for a *new trial*.

BUT IT WAS DENIED, because the judgment being signed of another Term, the motion was not proper until it was referred to a Master to report, whether it was regular, or not.

THE MASTER afterwards reported, that the judgment was regular, but that it being only an interlocutory judgment, the defendant, by the course of the court, and by several precedents, might move *in arrest of judgment* in another Term, but that he never knew a motion for a *new trial* in another Term, after judgment signed in a former Term (a).

BUT THE COUNSEL for the defendant insisted upon the granting a *new trial*; for the same reason which will warrant a motion in arrest of judgment will likewise warrant the like motion for a new trial.

THE COURT demanded of the Counsel, whether they could shew a motion was ever made for a new trial, and granted at another Term, after the signing of an interlocutory judgment; and that if they could not shew that such a motion * was made and * [265] granted, it should not be done in the present case.

TO WHICH it was answered, that the Counsel on the other side could not shew any precedent where such motion was made and denied; and if such a motion was never made, the merits of the case must be the guide to determine it now; for if there are not

(a) It was held, that a new trial could not be moved for at all after the interlocutory judgment was signed; and that there was no difference between a motion in the same Term, and a motion in another Term; and this case was cited as an absolute determination in general, without any such distinction, by *FILMER*: and *LEE*, Chief Justice, said, his note had no such distinction. MS. Rep. Mich. 12. Geo. 2. B. R. The King v. Armstrong. The rule-book hath been searched, by which it appears, that the first motion in this cause was made the same Term, and all things ordered to stay; therefore

there is no foundation for the above distinction; but THE COURT held, that this motion might be received, even in another Term, yet that was upon a supposition, that nothing had been done since verdict; and that signing judgment was the material act, which had made all attorneys-general sign the judgment as soon as they could by the rules of the court. 2. Stra. 1102. We presume, that the above inaccuracy in *Pollard's Case* occasioned Mr. JUSTICE FOSTER to say, it was wretchedly reported: this imputation, we hope, is now removed.—NOTE to the former edition.

THE KING any precedents against it, then the same reason which will warrant
against
POLLARD. a motion in arrest of judgment will warrant this motion for a new trial.

But **THE COURT** denied a new trial, because no precedent could be produced, that it was ever granted in another Term after the signing the judgment.

In an indictment on 5. *Anne*, c. 31. s. 3. against a receiver of stolen goods for a misdemeanor, it is not necessary to aver, that the principal hath not been taken.

1. Sid. 303.
2. Hawk. P. C. c. 25. s. 112.

Thereupon **IT WAS MOVED** in arrest of judgment, for that the indictment was ill; for the statute which gives a power to prosecute the accessory, though the principal be not before convicted, makes such a prosecution lawful "where the principal felon cannot be taken," which are the very words of the statute: now this indictment should have set forth, that the principal could not be taken; which being omitted it is wrong, and consequently the judgment should be arrested, the indictment not pursuing the statute, which is the warrant in this case.

ON THE OTHER SIDE *it was said*, that the statute makes the prosecution against the accessory lawful where the principal felon is not "before convicted," and not only where he could not "be taken (a)."

So the objection against the indictment was over-ruled (b).

In *Michaelmas Term* following, the defendant was brought up by *habeas corpus*, and had sentence to stand in the pillory at **THE ROYAL-EXCHANGE**, and to be imprisoned for a year.

(a) Attempts have been made, under various shapes, to prosecute the receiver as for a misdemeanor, while the principal hath been in custody, and amenable, but not convicted; but the late **MR. JUSTICE FOSTER** thought, that all devices of that kind were utterly illegal; for the statute 1. *Anne*, s. 2. c. 9. in the strict letter of it, seemed to be confined to the single case of the non-conviction of the principal, yet the subsequent statute, in order to make them both consistent, must be understood as explanatory of the former, since both acts plainly provide against one and the same mischief, viz. where the principal absconded, and was not amenable to justice; which the preamble of both shew to have been the mischief in the contemplation of the Legislature at the time they were made. *Fost. Discourse of Accomplices*, 373, 374. The opinion said to have been given in this case, as reported 2. *Ld. Raym.* 1370. weigheth very little with **MR. JUSTICE FOSTER**, and if taken in the latitude the words seem to imply (in the opinion of that Judge) is not law. "Where" (says the same able Judge) "the principal is amenable, the prosecutor hath an option whether to proceed against the receiver as for

"felony or misdemeanor, he must proceed as for felony; if he be not amenable, and the prosecutor chuseth to wait for his conviction, he may do so, and then proceed against the receiver as for felony; or at his own pleasure, as for a misdemeanor, without waiting until the principal should be amenable:" under these limitations, and these only, as **JUSTICE FOSTER** conceives, the prosecutor hath an option. "Besides" (continues that Judge), "the judgment of the Court in that case doth not appear to be founded on the opinion supposed to have been then given as the ruling principle, but on a much stronger and more rational motive. The Court would not, upon motion, arrest judgment upon an exception to the indictment which was never taken before, and which must overthrow every judgment that had been given on the statute. This was a solid and rational principle, founded in political justice. For in cases of this kind, *communis error facit jus*." *Fost. Disc. on Accompl.* 374.—*NOTE to the former edition.*

(b) See *Rex v. J. Baxter*, 5. Term Rep. 83. in point.

Jenny against Heale.

Cafe 183.

UPON A WRIT OF ERROR of a judgment given in the common pleas the case was thus : The plaintiff Jenny, in the year 1720, sold his lands to the defendant, who gave him a bill for the price or value thereof in these words, directed to one Pratt : " SIR, You are to pay to Mr. Jenny so much, &c. out of the money belonging to the Governors and Company of Devonshire Miners, &c. ;" and the money not being paid, the plaintiff Jenny brought his action in the common pleas upon this note, as a bill of exchange ; and on demurrer the plaintiff had judgment.

* But now the defendant in the original action brought a writ of error.

IT WAS ARGUED for the plaintiff in the action, that this is a good bill of exchange, for it has all the qualities of such a bill, that is, it has three persons, the drawer, the payer, and the drawee ; and a set form of words is not necessary in bills of exchange, nor is it necessary that it must be between merchants. And for this the case of *Bellasis v. Hesther (a)* was cited, where the objection was, that the custom of merchants was not set forth in the declaration ; but only that the defendant and one *Greeveson* were persons *negotiantes* in merchandize, and that *Greeveson* drew a bill on the defendant, payable to the plaintiff *secundum usum mercatorum* ; and this was held good ; and that to set forth the custom at large would be surplusage ; neither is it necessary to shew that it was between merchants. As the drawing or signing every bill of exchange implies a consideration for so doing, so the expressing that the money should be paid out of any certain fund does not make it worse ; and though it may be objected, that this is only a direction to the cashier to pay the money, yet it is still a bill of exchange.

ON THE OTHER SIDE it was said, that this was not a good bill of exchange ; for since the bare signing a bill implies a consideration in the person signing (who is the drawer), which being contrary to the ancient law, the plaintiff ought to shew, that the defendant signed this bill as a bill of exchange, or as a negotiable bill, for the rise and progress of these bills was admitted and introduced for the ease and accommodation of trade. If the Governors of the *South-Sea Company*, or of the *Bank of England*, had signed a note in this form, which is no more than an appointment or direction to their cashier to pay money, this would not bind them : now, the reason why bills of exchange charge the drawer is, because he has some consideration for drawing the bill ; but in the present case the drawer had no consideration ; besides, it is a contingent bill, it being payable out of the money belonging to the *Devonshire mines* : now, if the cashier had not money sufficient to pay and discharge this note, and for that reason had refused to accept it, certainly he

A bill in these words, " SIR, You are to pay to Mr. A. 1000l. upon demand, out of the money in your hands belonging to the Governor and Company of the Devonshire Miners," is not a bill of exchange within the custom of merchants.

S. C. 2. Ld. Ray. 1361.
S. C. 1. Stra. 591.
2. Ld. Raym. 1482. 1563.
10. Mod. 294. 316.
Fortes. Rep. 281.
2. Ld. Raym. 1481. 1563.
Bailey on Bills, 3.
Hard. 445.
3. Will. 207.
1. Bl. Rep. 782.

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could not be charged for non-acceptance, because he was only to accept if he had money belonging to the *Devonshire mines*. * In all the old bills of exchange, the words "value received" are inserted, though now not (a) necessary; and the want of those words was the only objection insisted on in the court of common pleas, on the demurrer to the declaration; and the form of the bill was not so much as mentioned. Besides, it does not appear that this bill did relate to trade (though that is not necessary); but where the contrary appears, it cannot be a bill of exchange.

THE COURT. This note is no more than a direction or appointment to the cashier to pay the money, and does not answer the necessity of trade; for it is not negotiable as a bill for money, therefore it would be inconvenient to charge the drawer; for if he might be charged on such a note, then any man who gives his (b) steward an order or authority to pay money might be charged for non-payment. Besides, it is the substance of the drawer which is always considered in bills of exchange, for it is that which makes them negotiable; but this new invention of drawing bills on cashiers to pay money out of funds makes no difference between the best and worst man as to his substance. It is true, there are three persons named in this note, of which the cashier of the Company is one; and this is all which makes it like a *bill of exchange*, though there are such bills between two persons, as where they are made payable by themselves, for so are *goldsmiths notes*: now if this note had been accepted by the cashier, and he had died without paying the money, certainly his executors could not be charged. It is true that custom has carried *bills of exchange* a great way, but never so far as to make them payable out of any particular fund.

And for these reasons the judgment in the common pleas was reversed (c).

(a) 1. Show. 4. Fort. 282. Bar. K. B. 88.

(b) Such an order to a steward to pay out of the drawer's rents is good.

(c) See *Joselyn v. Laffere*, 10. Mod. 294. 316. *Banbury v. Liffet*, 2. Stra. 1211. *Pearson v. Garnett*, Skin. 398. Comb. 227. *Beardley v. Baldwin*,

2. Stra. 1151. *Roberts v. Peake*, 1. Burr. 325. *Dawkes v. Delarain*, 3 Wils. 207. 2. Bl. Rep. 782. *Kingston v. Long*, Bailey, 71. *Peirson v. Dunlop*, Dougl. 571. *Carlos v. Tancourt*, 5. Term Rep. 482.—See also *Kyd on Bills of Exchange*, 31 to 36.

Case 184. The King against Ludlam, Chamberlain of London.

A bye-law of the city of London,

"That every person using

"the trade of a joiner shall be free of the Joiners Company, and that every apprentice to a joiner shall forfeit

"ten pounds if he be admitted to the freedom of any other Company," is good; but if a person who has served an apprenticeship to a merchant-taylor use the trade of a joiner, the Court will grant a

mandamus to the Joiners Company to admit him to his freedom, in order to avoid the penalty.—

A. C. Stra. 675.

UPON a mandamus to admit *George Warren* to his freedom of the city of London, he having served an apprenticeship to the warden of the *Company of Merchant-Tailors*;

the Court will grant a mandamus to the *Joiners Company* to admit him to his freedom, in order to avoid the penalty.—

THE CHAMBERLAIN made a return of the custom of *London* to make bye-laws, and that a bye-law was made the nineteenth of *October*, in the sixth year of *William and Mary*, that no person using the trade of a joiner should be made free of any other Company but that of the joiners, with an express prohibition to the Chamberlain to that effect; and that every person who had served an apprenticeship to a joiner should, upon notice, take up his freedom, with a penalty of ten pounds if he is admitted of any other Company; that this man has used the trade of a joiner: * wherefore he was never admitted.

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The question was, Whether this is a good bye-law or not?

IT WAS ARGUED *against the return*, that it was not, because the city of *London* for many ages past has been supplied with all their superior officers out of the twelve great Companies, of which this of the merchant-taylors is one; and that *Warren* is free of that Company, and therefore he shall not be compelled to be free of any other. There are but two ways of being free, either *by birth* and *by acquisition*, for every freeman's child is free of the same Company of which his father was free; and if such child should be of another trade, certainly he would not be obliged to purchase his freedom in another Company. Besides this return is ill, for it is, that he who exercises the trade of a joiner in *London*, must take his freedom in the *Company of Joiners*, if summoned for that purpose; and it is not set forth that *Warren* was summoned.

ON THE OTHER SIDE *it was argued*, that this was a good bye-law, and well returned; that it was a bye-law founded upon a custom, and confirmed by acts of parliament, and made by a great number of citizens (in common council assembled) to prevent abuses and frauds in trade. And as these guilds and fraternities have obtained this freedom as an encouragement of trade, so no custom should be established which is detrimental to it, as this custom would be, that a man who is free of one Company, shall not be compelled to be free of another more suitable to his trade and employment.

IT WAS ARGUED *in reply* against this bye-law, that though all the customs of the city of *London* are confirmed by act of parliament, yet * whenever an unreasonable custom is returned, it is always adjudged void; now if *Warren's* being free of the *Merchant-Taylors Company* did screen him or his work from the inspection or inquiry of the *Joiners Company*, it might be reasonable that he should be admitted of that Company; but when it does not, there can be no manner of inconvenience of taking his freedom in another Company, and not in this; and so is the case of *Robinson v. Gros court (a)*, which has been already cited and unanswered. It was thus: An action of debt was brought for ten pounds, forfeited upon the breach of a bye-law, which was, that every person

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exercising the occupation of music and dancing within the city of London, who shall have a privilege to be made free by patrimony, shall at the next court of assistants of the *Company of Musicians*, after notice, accept and take the freedom of the said Company, under the penalty of ten pounds; this was adjudged a void bye-law, for it has no custom to support it. It is true, the custom was laid to be, that whoever is free of the City must be free of some Company; but that custom does not oblige a man to be of any particular Company, but leaves it at large to be free of some Company: now in this case, though *Groscourt* the defendant should be intitled by birth, or by apprenticeship, to be free of a Company, yet he must likewise be free of the *Company of Musicians*; so that this bye-law exceeds the custom, and for that reason it was held void; and so should this, and for the same reason.

THE COURT. The common-council have power to make any reasonable bye-laws; and this in the principal case seems to be such; for it was made to prevent frauds in trade, by subjecting a man to the inspection of those who understand the same trade, viz. the trade of a joiner, which the *Company of Merchant Taylors* does not; but the only question which admits any doubt is, whether a man who is free of the *Merchant-Taylors Company*, and exercises the trade of a joiner, may demand his freedom in the *Joiners Company*; for if he may not demand it, then this bye-law is manifestly injurious to him, because it takes away his right of freedom in one Company, and gives him no right to his freedom in another Company.

But by FORTESCUE, *Justice*, Certainly a bye-law which makes it penal for a man to exercise any other trade, entitles him to his freedom in the Company of the same trade; and it is a reasonable bye-law which hinders men from exercising such trades, and being free of such Companies, who have no knowledge in those trades.

RAYMOND, *Justice*. The case of *Robinson v. Groscourt* differs from this, because in that case there was no Company of *Dancing-Masters*, of which the defendant might be made free; and besides, this case was never determined, but was adjourned by reason of another exception to the proceedings. Now this bye law being agreeable to the constitution of the City, and not restraining trade, but rather regulating it, by subjecting several artificers to be under the inspection of others who understand the same trade, which cannot be better done than by compelling them to take their freedom in a Company of that trade in which they are employed;

Therefore this was adjudged a reasonable bye-law.

THE COURT. The freedom of the City cannot be taken from a man, provided he will take his freedom in a proper Company; and if that Company will not admit him, the Court will grant a *mandamus* to compel them; but on this return it appears, that every man who exercises the trade of a joiner, &c. within the city

of London, ought to be free of the *Company of Joiners*; but it does not shew that the defendant did exercise that trade in the city, &c. but that he did exercise the trade of a *joiner* generally, without saying where, and then it might be at *York* or anywhere else; but it is his exercising it within the city of *London* which gives them jurisdiction.

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And for this reason it was adjourned (a).

(a) This case was argued again in Trinity Term 12. Geo. 1. and in the Michaelmas Term following the Court were all of opinion, FIRST, That this is a good bye-law, being made in regulation of trade, and to prevent fraud and unskilfulness, of which none but a Company that exercise the same trade can be judges.—SECONDLY, That this does not take away the apprentice's right to his freedom, but only his election of what

Company he shall be free, and directs him to the proper Company.—THIRDLY, That it being said he *shall* take up his freedom in that Company under the penalty of ten pounds, he is entitled to a *mandamus* to prevent the forfeiture. S. C. 1. Stra. 676. and see the case of *Harrison v. Goodman*, 1. Burr. 12. and *Rex v. Sir Thomas Harrison*, 3. Burr. 1323. in which last case the above decision is recognized as law.

Ashton against Blagrove.

Case 185.

IN AN ACTION ON THE CASE for scandalous words spoken of a justice of peace, there being a *colloquium* laid of the plaintiff, and of his office of justice of the peace, the defendant spoke the following words, "He," meaning the plaintiff, "is a rascal, a villain, and a liar."

To say of a justice of the peace in the execution of his office, "He is a RASCAL, a VILLAIN, and a LIAR," is actionable.

Upon not guilty pleaded the plaintiff had a verdict.

S. C. 1. Stra. 617.
S. C. Fort. 206.
S. C. 2. Ld. Ray. 1369.
4. Bac. Abr. 489.

Upon a motion in arrest of judgment, a rule was made that the plaintiff should shew cause, &c. and now

IT WAS MOVED for judgment, that these words were actionable, because they convey an idea too mean, and very much unbecoming the office of a justice of peace, and the meaning of words is always to be taken according to common intendment; therefore the calling a man "*daffi-down-dilly*" and "*ambidexter*," was held actionable, though those words import no crime in themselves, but in common acceptation are applied to some crimes. * The signification of words is various: as for instance; it is now actionable to call a man "*Jacobite*" or "*Papist*," but it was not so in a late reign; therefore words must be construed to be scandalous, or not, according to the common acceptation when they are spoken: but the words in the principal case did always import a meanness and scandal of the person of whom they were spoken; and there is a difference between speaking of a justice of the peace, and speaking of him in his office, as specially laid in this declaration.

* [271]

IT WAS SAID on the other side, that these words are so foreign to the office of a justice of the peace, that though he is named, they cannot imply any scandal to his office, for none of them alone are actionable; the word "*rascal*" is not, nor the word "*villain*," unless

ASHTON
against
BLAGRAVE.

unless some other words are added, as "stay the villain," or "seize the villain;" neither is the word "liar" actionable; and if they are not actionable alone, they are not so when taken all together; and the rather, because they are not of any certain signification. It is true, it is actionable to say of a justice of the peace, that he is "a coverer of thieves," because this is against his oath as justice of the peace (a); but it is otherwise for calling him, "rogue" or "varlet;" (b) and so it is to say "he is a vermin in the common-wealth;" (c) neither is it actionable to call him "a fool," (d) "an ass," (e) "a coxcomb," (f) "a buffle-head justice;" (g) so the words in this case are not actionable.

To WHICH it was answered, that a justice of the peace has a double capacity, and that where it does not appear that the words were spoken of him as a justice, they may not bear an action, but where they were spoken of him relating to his office, they are actionable.

2 Ld. Ray. 1369,
1370.
Stra. 618.
Fortesc. Rep.
407.

PRATT, Chief Justice, delivered the resolution of the Court (b): That the words were actionable, they being laid to have been spoken of the plaintiff in the execution of his office, and so found: so that it is the same as if the defendant had said, that the plaintiff is "a villain in the execution of his office," "a rascal in the execution of his office:" the words "rascal" and "villain," spoken of a justice of peace, where a *colloquium* is laid of his office, import a scandal; for admitting those words to be of an uncertain signification, yet they carry with them great scandal, and in common understanding import a vile and base man, and that he is so in *executione officii*, and are a great imputation against the plaintiff's integrity and behaviour in that office. But to say "he is a liar in the execution of his office," is as much as to say, the justice of peace acts partially and corruptly in the execution of his office. He must give false judgments, knowing them to be false; for it cannot be a lie, unless he knows it to be false; and though it were a right judgment, and he thought it to be wrong, and so intended it, it would be partiality and corruption; and the scripture says, that "a thief is better than a man accustomed to lying;" and therefore none of the cases cited come up to this case; so taken all together they are scandalous words.

See Sir John
Hawles's Re-
marks on Fitz
Harris's trial,
fol. 9.

And the plaintiff had judgment.

- (a) Hob. 117. 4 Co. 16.
- (b) 4 Co. 13. Moor, 141.
- (c) 1. Roll. Ab. 57.
- (d) 1. Lev. 52.
- (e) 1. Sid. 67.
- (f) 1. Salk. 695.

- (g) 1. Lev. 52.
- (b) This opinion was delivered on the 26th November, 1725, in Michaelmas Term, in the eleventh year of George the First.

* Reynolds against Clerk.

Case 186.

Tuesday, 16 June 1725.

TRESPASS *vi et armis* against the defendant for entering into the plaintiff's house and yard, and fixing a spout on his own house, for conveying the rain water from his house into the said yard, *ratione cuius aqua currebat in stabulum* of the plaintiff, *et occasione inde* rotted the timber, &c. whereas before the water dropped from the eaves of the defendant's house into the said yard, and then did no damage, *ad damnum, &c.*

If a man has a right to the use of a yard in common with the owner, he does not commit a trespass by entering into the yard in order to fix a water-spout to his house; but if any injury is done to the owner of the yard, in consequence of fixing such spouts, he may recover damages in an action on the case.

The defendant pleaded *not guilty* as to all, except entering the house and yard and fixing the spout on his own house; and as to that he justified, for that T. S. being seised in fee as well of the plaintiff's as of the defendant's house, which was adjoining to the yard belonging to the plaintiff's house, by indenture conveyed the house and yard to the plaintiff, with an exception in the deed of the free use of the yard, &c. to the said T. S. and to all the tenants and occupiers of the defendant's house, which house was afterwards conveyed to the defendant; and averred that the spout so fixed was necessary for the use of the defendant's house, and so justified by virtue of that exception.

S. C. 1. Stra. 334. 634.
S. C. Fortesc. 212.
S. C. 2. Ld. Ray. 1399.
Fort. 211.
Holt, 22.
Esp. Dig. 598.
2. Burr. 1113.
3. Burr. 1556.
1. Com. Dig. "Action on the Case" (A.), 1. Bac. Abr. 49.
Doug. 594. (573.).
6. Com. Dig. "Trespass" (D.).

And upon a demurrer to this plea,

IT WAS INSISTED *for the plaintiff*, that this justification was not good, because the spout was a nuisance to him; and though T. S. might justify the fixing it to one house, when both were in his possession, yet when both were sold to different persons, one of them cannot justify for a nuisance done to the other (a); and in this case the defendant had neither an express nor an implied power to set up any spout, especially when it would be a nuisance to the plaintiff. The use of this yard reserved to the defendant, is no more than an *easement* to his house, and not to be used to any other purpose; and the nature of a nuisance is such, that if it be of necessity, that is, if it be necessary or beneficial to him who made it, and another buy the land in which the nuisance was made, in such case the nuisance is purged; and if afterwards the lands come into different hands, it is not abatable; but if it is an unnecessary nuisance, it is only a suspension thereof when in one hand, and afterwards coming into different hands, it is abatable. But there are some privileges so very necessary as not to be extinguished by *unity of possession*, as paths to a mill, &c. for they shall revive as soon as the tenements come to different hands again. Now, in this case the defendant having erected this nuisance after the tenements came to different hands, there can be no colour for him to justify.

* [273]

THE COUNSEL *for the defendant* took no notice of the objection made on the other side, but insisted, that the plaintiff was mistaken

(a) Year Book 21. Hen. 7. pl. 25. Hob. 131. Poph. 166. 172. Dyer, 295. pl. 19.

REYNOLDS
against
CLERK.

in his action, because *trespass* would not lie for fixing a spout on his own house; but that if the plaintiff had any damage thereby, he ought to bring an *action on the case* to recover what he was damaged, for he had a licence to enter the yard, and could not be a trespasser for entering and fixing the spout on his own house. Besides, the defendant has averred in this plea, that the fixing this spout is for the necessary use of his house, which the plaintiff has confessed by the demurrer (*a*); therefore, when he justified the entering into the yard, the consequence thereof cannot be a trespass.

SECONDLY, The consequential damage in rotting the timber, is a description and part of the original trespass; for whatever comes under a *virtute cujus*, or a *per quod*, or *ratione inde*, cannot be traversed, being no new charge, only a farther description of the former charge (*b*). The plea therefore is good, though it do not particularly answer the rotting of the foundation, since that is only aggravation.

THE REPLY for the plaintiff. It is now insisted on by the defendant, that the plaintiff has mistaken his action; but not the defendant's innocence, and that an *action on the case* is the proper action for the plaintiff, which is very true, and so is a *quod permittat*; but yet *trespass* is likewise a proper action; for it cannot be denied, but that the freehold and inheritance of this yard is in the plaintiff, and that the defendant has only the bare use of it, and by misusing it he is a trespasser. It is true likewise, that the defendant had licence to enter the yard, but every licence must have a reasonable construction; for can it ever be intended, that because he had leave to enter the yard, and had the use thereof, that he might justify the throwing down the plaintiff's house?

THE CHIEF JUSTICE, upon the first arguing of this case, said, that this licence was granted by special words, so could not be so extensive as otherwise it would have been; for the case is no more than a grant of the house and yard; and to except the yard would be void as to the freehold; therefore the exception must be intended to some particular purpose, as to the use thereof, to walk in, or to go to the pump, and in such case he is to do no damage to the freehold; and if this licence be in any manner misused, to the prejudice of him who has the freehold, he who misuses it is a trespasser, as if he dig up the yard, &c. but the use which was made of it in this case, was to enter and fix a spout to his own house; now, though the original act was lawful, as done to his own house, yet he may be a trespasser, when the immediate consequence of such an act is injurious to his neighbour; for *suppose a man has a water-course running through his ground, and his neighbour diverts it, this is no trespass; but if, by diverting it, he turned it on his neighbour's house, it would be a trespass. The *per quod* is only the description of the trespass.

* [274]

(a) 8. Co. 146.

(b) 8. Co. 10. 1. Vent. 54. 340. T. Jones, 110.

For which reason THE CHIEF JUSTICE and ANOTHER JUDGE held this action of trespass was a proper action: but TWO OTHER JUDGES were of a contrary opinion.

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FORTESCUE, *Justice*. The defendant ought to have used the house as when both houses were in the possession of one man, then the water dropped from the eaves, and no spout was fixed; so that the fixing the spout is a nuisance to the plaintiff. I do not think the *per quod* to be merely a further description of the trespass, because it was fully described before. The entry into the yard is no trespass: a man having the use of a yard, may make all the common ordinary uses of it. An action of trespass is a possessory action, and must be founded on some act which disturbs the possession; this is not like the case of throwing filth, rubbish, &c. into a man's yard. Trespass is where an act is done immediately to the prejudice of another (a): and an action on the case is founded on an act which mediately tends to the damage of another (b); and this seems the true difference between an action of trespass and on the case, *Utere tuo ut alienum non lædas*. If one shooting at a bird destroy another's decoy, an action on the case only lies. In this case there is no immediate trespass done; he might enter into the yard; he might fix a spout to his own house, and for the consequent mediate damage arising from thence, an action on the case would have been the plaintiff's remedy.

Cas. Temp.
Holt, 16.
11. Mod. 73.
pl. 5. 130. pl.
10.
2. Kel. 273. pl.
210. S. P.

RAYMOND, *Justice*. The affixing the spout was a lawful act; but since its consequence is a nuisance to the plaintiff, the defendant is answerable for it. The only question is, Whether an action on the case, or trespass *vi et armis*, ought to have been brought? A distinction has been made between an act mediately or immediately prejudicing another. I remember the case of diverting a water-course mentioned by THE CHIEF JUSTICE, it was a West Country cause, *Courtney v. Collett* (c). The plaintiff brought an action of trespass *vi et armis*, for that the defendant having a water-course running through his land diverted the same, *per quod* the plaintiff's grounds were overflowed; after *not guilty* and a verdict for the plaintiff, it was moved in arrest of judgment and insisted on, that an *action upon the case* was the proper remedy, since the original act of diverting the water-course being in his own land was lawful; but the Court held the action of

(a) See 1. *Ld. Ray.* 188. 272. 2. *Will.* 313. 3. *Will.* 409. 412. 2. *Bl. Rep.* 894. 897. 3. *Burr.* 1114. 1559. 2. *Term Rep.* 225.

(b) *Cro. Eliz.* 219. *Cro. Jac.* 446.

(c) LEE, who afterwards argued for the plaintiff, cited this case as follows, and said he had it from *Serjeant Cartberw's* notes. *Hil. 9. Will.* 3. *Courtney v. Collett*. Trespass *vi et armis* by *Sir William Courtney quare clausum fregit, et in solo piscariam cepit; necnon de eo quod fregit et*

asportavit the flood gates, and opened the sluices, *per quod* the water came upon the plaintiff's pool. After a verdict for the plaintiff, GOULD, *Serjeant*, moved in arrest of judgment, because the latter part of the declaration charged a fact proper only for an action upon the case. But by THE COURT, An action of trespass is maintainable for the latter facts as well as for the first.—NOTE to the former edition.

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trespass maintainable, since the *per quod* could not be looked upon only as a description of the trespass (a), and accordingly the plaintiff had his judgment: which case is a full proof, that an action of trespass may be brought where the original act was no trespass; for diverting the water-course was not a trespass immediately prejudicial to the plaintiff.

PRATT, *Chief Justice*. The better opinion then has been, that wherever a damage is done, the party damaged is at liberty to bring either an action of trespass or an action on the case.

FORTESCUE, *Justice*. It seems odd to make a man a trespasser, for doing a lawful act within his own grounds.

RAYMOND, *Justice*. If the act stops there, it is odd, not else.

Adjournatur.

Afterwards, in *Trinity Term*, in the eleventh year of *George the First*, this point was argued again;

THE QUESTION being, Whether trespass lies for entering his yard, and setting a spout on his own house?

IT WAS ARGUED, that it did not, but that an *action on the case* was the proper remedy. It was admitted, that where the original act is a wrong actually done, in such case trespass lies, but where the original act was lawful, and consequential damages ensue, there an action on the case is the proper remedy. The complaint against the defendant is for a nonfeasance, *viz.* for that he did not take care that this spout should not damnify the plaintiff's house; and it is certain that trespass will not lie for a *nonfeasance*: if the defendant had undertaken to cure the plaintiff's horse, and by his negligence the horse had died, yet trespass would not lie against him, though the horse was the property of another man; but in this case the house was his own. The case of *Edwards v. Hallender* (b) is full in point, which was thus: The plaintiff had a cellar, and the defendant had a warehouse over that cellar, on which he laid so great a burthen, that the floor broke and fell into the cellar and spoiled three butts of wine; and it was adjudged, that an action on the case, and not an action of trespass, lay against the defendant.

* [275]

* IT WAS ARGUED *for the plaintiff* that *trespass* is the proper action; for though it was lawful for the defendant to fix the spout on his own house, yet he ought not to do it in such a manner so as immediately to trespass his neighbour; like the case of *Preston v. Mercer* (c), which was trespass *vi et armis* for causing stinking

(a) *Raymond*, when he afterwards delivered the resolution of the Court on the second argument, being then *Chief Justice*, gave a different account of this case from what he does here, and declared that the above account given of it

from his memory was mistaken. *Str.* 635.

(b) *Poph.* 46. *Cro. Eliz.* 285. 2. *Leon.* 93.

(c) *Hard.* 60.

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CLARK.

water in his yard to run to the walls of the plaintiff's house, and piercing them so that it run into his cellar; after a verdict for the plaintiff, it was moved in arrest of judgment, that trespass *vi et armis* would not lie against the defendant, because a man cannot be a trespasser with force and arms in his own ground; he ought to bring an action on the case; but judgment was given for the plaintiff.

TO WHICH it was answered, that the original act was a wrong done, *viz.* by causing stinking water to run to the walls of the plaintiff's house, which differs from the principal case, and so is no authority for the plaintiff.

RAYMOND, Chief Justice. The case of *Preston v. Mercer* (a) was a proper action of trespass, for the declaration charged that the defendant did make the water to run, which is an immediate tort. In the case of *Courtney v. Collett* (b) there was matter laid proper for an action of trespass; the question arose on what followed the *necnon*, whether it should be taken as aggravation of the former trespass, or as the description of a new one, and by my notes it does not appear that judgment was ever given (c). The bounds of all actions ought to be preserved; the right rule and distinction is, that where the act itself is unlawful and prejudicial, trespass must be brought; but if the act is lawful, and only by consequence a damage to the plaintiff, he must bring case. In the case of *Leveridge v. Boscall* (d), which was trespass on the case, the declaration was, that the plaintiff was possessed of a barn and a river adjoining; that the defendant dug two trenches, and thereby diverted the water of the river; and after verdict PRATT, Serjeant, moved in arrest of judgment, because the action ought to have been trespass *vi et armis*; but the plaintiff had his judgment; for, the declaration not specifying in whose ground the defendant dug the trenches, it shall be presumed to be in his own ground, and then, the first act being lawful, was no tort to the plaintiff; and the consequential damage only affected the plaintiff, which was proper for trespass on the case. I think this action is not maintainable.

POWYS, Justice, of the same opinion.

FORTESCUE, Justice. Trespass upon the case, and trespass *vi et armis*, are different in name and in their nature; for the one is called an action for a nuisance, and the other are called *actiones injuriarum*; the one must be brought for a wrong done immediately to the person or his possession, the other for a consequential damage. This action is brought for a wrong done to the possession, but not immediately; because the defendant had a right to come into the yard, and to fix a spout to his own house. If logs are laid in the highway by which any person is hurt, he must bring case (e); but if the hurt is received by logs thrown at the person, he must bring trespass *vi et armis*. Case must be brought

(a) Hartres, 60.

(b) 1 Ld. Raym. 272.

(c) See 11. Mod. 164.

(d) Stra. 636. s. Ld. Ray. 402.

(e) Stra. 636.

REYNOLDS
against
Clerk.

for making sluices in a man's own ground, by which my land is overflowed (a). The objection to the case of *Courtney v. Collett* was, that trespass *vi et armis* and trespass *on the case* could not be joined in one declaration; no judgment was given that I can find in my notes; in some cases I think those two actions might be joined. It not appearing in that case whose the flood-gates were, they might be the defendant's own, and then trespass *on the case* ought to be brought. In this case the fixing the spout was lawful; so was the entering the yard by virtue of the reservation which gives a right to use the yard as well as the pump, &c.

REYNOLDS, *Justice*, of the same opinion.

Judgment for the defendant (b).

(a) 1. Roll. Abr. 104.

Hawker v. Birbeck, 2. Burr. 1556.

(b) See Gates v. Bayley, 2. Will. 313.

Morgan v Hughes, 2. Term Rep. 225.

Scott v. Shepherd, 2. Bl. Rep. 892.

Case 187.

Waddy against Newton.

Where the acres mentioned in a fine or common recovery shall be taken by computation, and not by the statute *De Terris Mensurandis*.

* [276]

UPON a special verdict in ejectment, the case was thus:—Tenants in tail covenanted to levy a *fine* and suffer a *common recovery* of the lands now in question, and of a fishery; and accordingly levied the fine thereof by the name of one hundred and twenty acres of land in *Stockwell-hall*, in the county of, &c. and of ten acres *aqua cooperta*; and declared the use thereof to himself and his heirs. * But there being many more than one hundred and forty acres statute measure, the defendant, who was heir in tail, would contest the right to all above those hundred and forty acres.

The plaintiff thereupon brought an ejectment, and suggested that the whole estate was computed to be one hundred and forty acres by the common computation in the country, &c. and upon *not guilty* pleaded the jury found a special verdict.

They found that the fine was levied and the recovery suffered by the name of one hundred and twenty acres of land, and of ten acres *aqua cooperta*; and that the whole estate entailed was computed in the country to be one hundred and forty acres of land.

IT WAS INSISTED for the plaintiff, that all the entailed lands were comprised in this fine by the name of one hundred and forty acres of land; and this by the intent of the tenant in tail who levied the fine; that computations are to be ascertained by a jury, according to how much it is reputed to be in the country where computations are made, and that they are tied down to the very country where the things are transacted; therefore where an *habere facias possessionem* is directed to the sheriff to put a man in possession of twenty acres, he must deliver twenty acres to him according to the usage of the country where the lands lie. So where tenant in tail of the manor of *Lavington*, and of two closes reputed parcel thereof, levied a fine and suffered a recovery of the manor, with

with the appurtenances (a); now though the two closes were only parcel of the manor in reputation, yet they were adjudged to pass, because it was intended by the parties that they should pass. The fishery likewise passes by the name of ten acres *aqua cooperta*; for it is demandable by that name in a *præcipe* (b), which is a real action; and so it is in an *assise* (c); and if a real action will lie for it, certainly an ejectment will.

WADDY
against
NEWTON.

THE COUNSEL for the defendant. It is not pretended that this computation is the common way of measuring lands by the custom of the county or hundred, but only by the custom of *Stockwell-hall*, in the county of, &c. and it will be very difficult to know how far that extends; so there being no manner of certainty to fix the custom, the plaintiff can never get over the statute *De Mensurandis Terris* (d); but the Court will judge of the number of acres comprised in this fine and recovery, according to that statute, as a certain rule to direct their judgment. * Now by that statute, an acre of land containing ten perches in length, must be sixteen perches in breadth, and so on; therefore these hundred and forty acres comprised in this fine, must be according to that measure, and not left to an uncertain computation; and there is a difference between a manor which is fixed to no certain measure, and a quantity of acres where the measure is ascertained by the statute. It is true, if it was the custom of the county or of the hundred, so as it was limited or fixed to a certain place, this method of computation might be good; as an acre in *Cornwall*, or a perch in *Staffordshire*; because the public usage of the county gives it a sanction; and there are some law books (e) which prove that the measure in those counties is different from all other places in *England*; and so are the prices of the things measured. But in the present case, the acres, if taken by computation, are two-fifths larger than the common or statute measure, without confining such computation to any certain place; and in all the cases wherein it is mentioned, what passed by suffering a recovery of a manor in reputation, it is alledged in the deed, that the covenantor is to suffer a recovery of a reputed manor; but it is not set forth in this deed, that the covenantor was to suffer a common recovery of so many acres in reputation, but only of one hundred and forty acres generally. Besides there is a difference between a fine levied and a recovery suffered in pursuance of a contract for a valuable consideration, and a voluntary fine and recovery as this is; for in the one case, the prior agreement governs the whole; but where there is no such agreement, the ordinary course of law is to be the guide, and no strained construction shall be deduced from the intention of the parties. And it is to be observed, that the statute *De Terris Mensurandis* was made on purpose to ascertain the fine due to the king,

* [277]

(a) *Thyn v. Thyn*, 1. Vent. 51.
S. C. 1. Lev. 27. S. C. 1. Sid. 190.
S. C. 1. Mod. 190.
(b) 1. Mod. 259.

(c) 2. Inst. 42.
(d) 34. Edw. 1. c. .
(e) *Crompt. Jurif.* 222.

Trinity Term, 10. Geo. 1. In B. R.

WADDY
against
NEWTON.

by alienation of lands by fines, and therefore such a loose computation of the number of acres shall not avoid the design of this statute; and if so, then where a man covenants to levy a fine of five hundred acres of land, certainly it must be intended statute acres.

Ejectment will
not lie of a
fishery.

As to the fishery, the plaintiff has no colour to have judgment, because an ejectment will not lie of a fishery, nor in any case but where there may be an entry and expulsion; and that cannot be of a fishery, especially in this case where it is of a fishery in the river *Tyne*, which cannot pass by the name of so many acres *aqua cooperta*, because it is not like a pond where the very soil is the property of another; but this is only a freedom to fish in that river.

* [278]

THE COURT. It is admitted by the Counsel for the defendant, that if this fine had been levied, and a recovery suffered, in pursuance of a former agreement or covenant for a valuable consideration, and that it had appeared to be the intent of the parties to pass the whole estate by the name of one hundred and forty acres, in such case the whole would pass. Now here the jury has found that the whole estate entailed, was computed in the county to be one hundred and forty acres; and it will be difficult to apprehend a difference between a covenant for a valuable consideration, and a voluntary covenant; for it cannot reasonably be said, that the same words shall pass all the lands in one case, and shall not pass the whole in the other case, especially when the tenant had it in his power to pass it as he pleased.

BUT THEY HELD that an *ejectment* would not lie of a *fishery* (a); so the defendant must have judgment as to that matter.

But because THE CHIEF JUSTICE who tried this cause, did believe that the defendant was surprized by the finding of the jury, that the whole estate tail was computed in the country to be one hundred and forty acres, they would not tie him down to this verdict, but admit him to bring a new ejectment to try the truth of that matter, and that they would consider of the judgment until next Term; but recommended it to the parties to agree in the mean time.

(a) See *Herbert v. Langbanc*, Cro. Car. 492. only a profit *à prendre*, but that it will lie *de terra aqua cooperta*.
de piscaria in such a river, because it is

Case 188.

Serle against Barrington.

Thursday, 18 June, 1725.

In debt by an
executrix on a
bond of thirty-
five years stand-
ing,

THIS was an action of debt brought by an executrix upon an old bond for money due to the intestate; and upon oyer of the bond, and the condition thereof, it appeared to be dated in the

year 1719, if the defendant plead *solvit ad diem*, and rely upon the presumption of law that the bond is paid, being more than twenty years old, the plaintiff may rebut that presumption by shewing an indorsement of the payment of interest for one year, after the bond was nine years old, written in the hand of the testator.—S. C. Eq. Abr. 414. S. C. 2. Stra. 826. S. C. 2. Ld. Ray. 1370. S. C. 3. Peer Wms. 297. S. C. 3. Bro. P. C. 535. 6. Mod. 22. 1. Burr. 434. 4. Burr. 1963. 1. Term Rep. 270.

ninth

ninth year of *William the Third*, which was thirty-five years past ; and thereupon the defendant pleaded *solvit ad diem* ; upon which they were at issue.

SERLE
against
BARRINGTON.

At the trial the defendant offered to prove the issue by presumption (*i. e.*), this being a bond of more than twenty years standing, and no interest being paid in all that time, it must be presumed that the principal was paid on the day.

* To encounter this presumption, the plaintiff offered to give another presumption in evidence, and that was an indorsement of the payment of interest for one year after the bond was nine years old, which indorsement was written with the testator's own hand.

* [279]

THE QUESTION was, Whether that should be given in evidence at the trial.

It was proved that after the death of the testator, this bond was found amongst his papers, and that the testator was esteemed an honest man. No evidence was given to prove, whether the indorsement was made by the obligee or obligor, or that this indorsement was ever seen by any person.

Upon which the plaintiff was *nonprossed*.

PRATT, *Chief Justice*, ordered, that this matter should be referred by way of a case stated for the opinion of the Court.

IT WAS ARGUED *for the plaintiff*, that though it is a general rule, that no man can be evidence in his own cause, yet where the necessity of the case requires it, he shall be a witness ; as on the *statute of Winton*, where the person robbed is allowed to be evidence for himself to prove the robbery ; so where a servant is admitted to be evidence to prove the delivery of his master's goods to a carrier, though at the same time he swears to discharge himself ; and this is from the necessity in such cases, because probably there may be no other evidence to prove those facts. Besides, in this case, the indorsement being of the intestate's hand-writing should rather be given in evidence, because it is to prove money paid in discharge of what was owing by the defendant ; and it would be very hard to require any other proof, because none can be had of such transactions but his own indorsement ; and the allowing it to be given in evidence is not an admitting it to be a sufficient proof for the jury to find for the plaintiff, but to let it have its due weight, that they may consider upon the whole merits.

IT WAS INSISTED *for the defendant*, that this should not be given in evidence, for if it should, it will be in the power of any man who can get an old bond into his possession, to charge the obligor again (after the money paid) by making such an indorsement ; and it would be as unreasonable and as inconvenient to put the defendant to prove the money paid after so long a time of acquiescence,

*Serjeant
against
BARRINGTON.*

quiescence, as it would be to put the plaintiff to prove an actual payment of the interest thus indorsed.

A new trial cannot be granted after the plaintiff has been nonsuited and the nonsuit recorded.

3. Will. 146.

352.

Cowp. 484.

3. Term Rep. 2.

FORTESCUE and RAYMOND, *Justices*, were of opinion, that this case ought to be judicially brought into court by *demurrer*, or by some other proper method; for the plaintiff being nonsuited, there is no cause now in court; and so whatever judgment is given it will be extrajudicial; and because such judgment will not determine the case, they at first were unwilling to give any judgment. — It is true, the indorsement made by the obligee charges himself, but if the obligor should get the bond into his possession, he may make as many indorsements as he will, and by that means wrong the obligee of all the interest; and THEY WERE OF OPINION, that this indorsement might be admitted in evidence; for it is the daily practice to make such indorsements on bonds, and generally at the request of the obligor; and this is the best and surest evidence of the payment of the money, because acquittances and notes may be lost, whereas indorsements will continue as so many brands on the bond into whose hands soever it falls, as long as the original *lien* which creates the charge shall continue.

PRATT, *Chief Justice*, said, that at the trial he inclined to be of opinion that the indorsement ought not to be received as evidence; because it would leave too great a power in an obligee, in whose custody the bond always remains, to make such indorsements whenever he thinks proper: they may be made at any time, and so no bond can ever be presumed satisfied.

THE COURT seemed clearly of opinion, that the *nonprofs* be set aside; yet adjudged to search precedents (a).

(a) LITTLETON, FORTESCUE, and RAYMOND, *Justices*, were of opinion, that it ought to have been submitted to the consideration of the jury, S. C. 2. Stra. 827. but the Court were of opinion that the nonsuit being recorded, the plaintiff was out of court, and therefore a new trial could not be granted. But afterwards a new action was brought on the same bond, which was tried before RAYMOND, *Chief Justice*, who admitted the indorsement to be read in evidence; S. C. 2. Ld. Ray. 1371. and other evidence being given to induce the jury to believe the bond was not satisfied,

there was a verdict for the plaintiff, S. C. 3. Brown C. P. 536. upon which a bill of exceptions was tendered and signed, and judgment given for the plaintiff, which judgment was afterwards affirmed by the House of Lords on a writ of error, S. C. 3. Bro. Ca. P. 538. But it is a general rule, that after *twenty years*, and no interest paid during that time, a bond shall be presumed to be satisfied, unless something appears to answer that length of time, *Humphreys v. Humphreys*, 3. Peer Wms. 397. See also *Osward v. Leigh*, 1. Term Rep. 270.

Case 189.

Manning against Turner.

Judgment against the bail set aside upon the surrender of the principal

IT WAS MOVED to set aside a judgment against the bail, for that the principal surrendered himself the second day of May; and seven days afterwards gave notice thereof to the attorney for the plaintiff, that he had surrendered himself on that day before Justice

TRACY,

TRACY, and two days afterwards he gave notice that he had surrendered himself before *Justice Powys*, and all this before the return of the second *scire facias*.

MANNING
against
TURNER.

IT WAS SAID *on the other side*, that though notice was given to the attorney, yet by the express rule of this court, the bail are not discharged until the bail-piece is marked, which was not done until after the return of the second *scire facias*. * It is true, there is an *exoneretur* entered now, but that was after the signing the judgment.

* [281]

TO WHICH *it was replied*, that admitting the fact to be as before-mentioned, yet the judgment ought to be set aside, because the plaintiff's attorney took the bail-piece from the Judge's chamber, but did not leave it with the proper officer; but as soon as it was left with him, the attorney for the defendant entered an *exoneretur*, so that it was the plaintiff's fault that it was not entered sooner.

Tidd's Pract.
150.

This matter being referred to THE MASTER, he reported, that the principal surrendered himself on the second day of *May*, and notice was given to the plaintiff's attorney, that the surrender was before *Justice TRACY* on the seventh day of *May*, and two days afterwards that it was before *Justice Powys*, and the bail-piece was discharged on the fourth of the same month, and that the second *scire facias* was returnable on the ninth day of *May*, and that the plaintiff's attorney took the bail-piece from the Judge's chamber, and kept it for a considerable time; and that there was not fifteen days between the *teste* and return of the second *scire facias*; neither was it four days in the office.

And upon this report the judgment was set aside.

Wild against Harding.

Case 190.

A RULE was made to discharge the bail, on a pretence that the principal had surrendered himself before the return of the second *scire facias* against the bail.

Bail are not discharged upon the surrender of the principal, unless an *exoneretur* is entered on the bail-piece.

IT WAS MOVED to discharge that rule for two reasons: first, For that if there was any such surrender, the plaintiff's attorney had no notice of it; and secondly, If there had been notice, the defendant's attorney should have brought the bail-piece before the Master to have it discharged, otherwise it is no surrender by the express rule of this court; and neither of these things being done, the surrender is not regular, and therefore the bail are not discharged, there being no *exoneretur* entered on the bail-piece, not that the plaintiff owned the surrender was made in time.

Tidd's Pract.
150.

THE COURT. It is the practice of the Court, that the bail are not discharged without entering an *exoneretur* on the bail-piece, on notice given of the surrender; but if the defendants did not give notice, it is an irregularity which will not be supplied by the

WILD
against
HARDING

Court without paying costs; but if the bail surrendered the * principal fairly, though not strictly regular, they ought to be favoured, and are indulged by the Court to surrender him at any time before the return of the second *scire facias*; now the question in this case is, Whether the principal did surrender himself before such return? and the best evidence of that matter is the bail-piece; but if he did surrender himself, and gave notice, he ought to pay costs until the bail-piece was marked; for he is to take notice of the *exoneretur*, and not of what the attorney for the plaintiff told him.

Case 191.

Goddard against Gilman.

Where a *scire facias* without a *testatum* is not good.

THE PLAINTIFF brought an action of debt in London, and had judgment, and sued out a *scire facias* directed to the sheriff, without a *testatum scire facias* into London, by virtue whereof the defendant's goods were taken in execution in Middlesex; and because this was done by an original *scire facias* without a *testatum*, the execution was set aside as irregular.

The plaintiff now moved, that, he having a judgment with a release of errors, the goods might remain in the sheriff's hands, and not be delivered to the defendant, who was a poor man, for by that means the plaintiff would lose his debt.

THE COURT. When the execution is set aside, as it was in this case, the goods taken must be returned, because there can be no colour for the sheriff to detain them (a).

(a) The like rule was made in Michaelmas Term following, in the case of White v Cornwall, where an action was had in one county, and the plaintiff had judgment, and took out a *scire facias* directed to the sheriff of another county, without a *testatum*, &c. afterwards, the plaintiff's attorney perceiving this mistake, sued out a *testatum scire facias* into that county; but before it came to the

sheriff he had executed the first writ, and afterwards he executed the other writ; but the execution was set aside, because the first writ being executed, the sheriff could not regularly execute the other.—NOTE to the former edition—See also Brand v Mearns, 3. Term Rep. 388. Millstead v. Coppard, 5. Term Rep. 272. and Copperthwait v. Owen, 3. Term Rep. 657.

Case 192.

* Fry against Carhe.

Words where actionable.

ACTION ON THE CASE for these scandalous words: "Fry" (the plaintiff) "had the Pretender's picture in his room, and "I saw him drink his health, and he said that he" (the Pretender) "had a right to THE CROWN."

IT WAS MOVED in arrest of judgment, that these words are not actionable.

But THE COURT would not suffer the defendant's Counsel to insist on it, for that they all held that the words were actionable.

And so the plaintiff had his judgment.

The

The King *against* Sir Charles Holloway.

Case 193.

THE COURT was moved for leave to file an information against the defendant, who was about fifteen years old, and a scholar at *Winchester-School*, for assaulting, beating, and challenging, one *Eyras*, a clergyman, who was then second matter of that school, for no other cause but that the said schoolmaster reproved the defendant for something done at school.

Information against a school-boy for assaulting his master.

A rule was made for the defendant to shew cause.

Smith *against* Graham.

Case 194.

A RULE was granted upon a motion for a rule to shew cause why an attachment should not issue against one *Chase*, a bailiff, for taking insufficient bail, upon the arrest of one (at the plaintiff's suit) on a bill of *Middlesex*.

Attachment against a bailiff for taking insufficient bail.

* [284]

Martin *against* Budgell.

Case 195.

THIS was a motion for leave to file a bill to warrant the proceedings in this court after a writ of error brought in parliament, and the want of a bill assigned for error; and upon a *certiorari* directed to THE CHIEF JUSTICE, he certified to the house of lords, that there was no bill filed in *Hilary Term*.

If want of a bill filed be assigned for error, and the Chief Justice certify that no bill was filed in that Term, it shall not be filed in another Term.

IT WAS NOW MOVED to file a bill * as of another Term.

A rule was made to move the house of lords for another *certiorari*; and the house ordered, that the plaintiff should have leave to bring another *certiorari* to certify a bill filed of another Term.

S. C. post. 362.

And now this Court was moved, that the plaintiff might have leave to file a bill as of that other Term, viz. as of *Michaelmas Term*, and to enter continuances to warrant the proceedings; the like having been done in the case of *Wainley v. Carey (a)*, where, in the common pleas, THE MEMORANDUM was allowed to be amended, and set right by the bill, it being to affirm the judgment of this Court, which had been affirmed on a writ of error in the exchequer-chamber. Now in the principal case, a writ of error was brought in the house of lords, after a bill exhibited in chancery for relief, and that bill dismissed on hearing the cause; for which reason this Court ought to do anything in their power to support this judgment, especially since the merits are entirely against the plaintiff in error, otherwise he would have been relieved in equity.

3. Peer. Wms. 314.

E contra. This motion is improper, because the want of a bill filed in such a Term was assigned for error in the house of lords,

(a) See post. 362.

Martin
Burdett.

and that want was certified as of that Term by THE CHIEF JUSTICE: therefore a bill of any other Term will not warrant this proceeding; for THE MEMORANDUM in this declaration refers to a bill of *Hilary Term*, which cannot be warranted by a bill of another Term, and by entering continuances; and though the judgments in the common pleas are supported by originals of former Terms by entering continuances, it does not follow that the like may be done in this court; for in the common pleas, THE MEMORANDUM in the declaration is always general, without referring to any certain Term, as thus, "*alias prout patet Termino Paschæ, &c.*;" but in this court it recites, that the bill was of such a Term, viz. "MEMORANDUM, quod alias, scilicet, Termino Sancti Michaelis (the plaintiff) protulit quandam billam suam." Now if there was no bill of that Term, and the plaintiff should get judgment, it ought to be reversed for that reason. Besides, where the want of a bill is assigned for error, the Court may indulge the plaintiff so far as to give him leave to file one; but never after THE CHIEF JUSTICE has certified the want of a bill of that Term, and the record closed. This being a judgment upon a demurrer, the want of a bill is certainly assignable for error, and it is a good cause * to reverse a judgment; and this appears by the statute made for the amendment of the law (a); by which it is enacted, "that all the statutes of *Jeofails* shall extend to judgments by confession, *nil dicit, &c.*;" and no such judgment shall be reversed, so as an original writ or bill is filed; which imports, that if no bill be filed the judgment shall be reversed. Now if the plaintiff might have leave to file originals and bills at any time, it is in vain to assign the want of them for error; but it is plain this cannot be done at any time, because THE FILAZERS will not make them out after two Terms without application to the chancery; and then it is allowed upon some equitable circumstances, but not otherwise.

* [285]

And THE COURT seemed to be of opinion, that this motion was improper after the want of a bill filed in that Term was certified by the Chief Justice (b). *

(a) 4. & 5. Anne, c. 16.

(b) See post. 368.

Case 196. The King against The Parish of St. John the Baptist,

Saturday, 22 June, 1725.

If an apprentice serve his master by day in one parish, and lodge on nights with his father in another parish, he does not gain a settlement in the master's parish, although his lodging with his father is paid for by the master, in pursuance of a covenant in the indentures, but he gains a settlement under the indenture in the father's parish.—S. C. 2. Ld. Ray. 1371. S. C. 1. Stra. 594. S. C. Sett. & Rem. 120. S. C. Fortesc. 321. S. C. Foley, 220.

Upon

Trinity Term, 10. Geo. 1. In B. R.

THE KING
against
THE PARISH
OF ST. JOHN
THE BAPTIST.

Upon an appeal to the quarter-sessions, the order of the two justices was quashed, and the paupers were sent back to *St. John the Baptist*, as the place of their last legal settlement; which orders being removed into the king's bench by *certiorari*, the order of sessions stated the fact specially thus: *Joseph Warren*, junior, father of the said *Elizabeth* and *Anne Warren* (who are removed by the order), was born in the chapelry of *St. James*, and afterwards, on or before the twenty-fifth of *March 1712*, *John Powell*, of the parish of *St. John's*, hosier and ropemaker, hired the said *Joseph Warren* as a weekly servant, and paid him weekly, *Joseph Warren* served him two years and upwards in manner aforesaid. By indenture dated on or about the twenty-fifth day of *March 1712*, and executed two years after the date thereof, he was bound an apprentice to the said *John Powell*, in which said indenture are contained two covenants in the words following, viz. "And the said *Joseph Warren* the father doth hereby, for himself, his executors, and administrators, covenant and agree to and with the said *John Powell*, his executors and assigns, that he, the said *Joseph Warren* the father, his executors and administrators, shall and will, at his and their own proper costs and charges, provide and allow unto and for his said son sufficient and necessary meat, drink, washing, lodging, and apparel, and all other things fit and convenient for an apprentice of the said trade, during the last five years of the said term. And the said *John Powell* for his part, doth hereby, for himself, his executors, and assigns, covenant, promise, and agree to and with the said *Joseph Warren* the father, his executors and administrators, that he, the said *John Powell*, his executors and assigns, shall and will well and truly pay, or cause to be paid, unto the said *Joseph Warren* the father, his executors and administrators, the sum of two shillings and sixpence of lawful money of *Great Britain* by the week, weekly, during the third year of the said term of seven years, except such time or times as he the said *Joseph Warren* the apprentice shall by sickness or any other accident be unable to work at the said trade; and three shillings of like money aforesaid by the week, weekly, during the fourth year of the said term; and three shillings and sixpence of like money by the week, weekly, during the fifth year of the said term; and four shillings of like money by the week, weekly, during the last two years of the said term of seven years (except such time or times of inability as aforesaid)." In pursuance of the indenture, *Joseph Warren* began to serve the said *Powell* in his open shop in the said parish of *St. John's*, but had his meat, drink, washing, and lodging, during all the time, with his father in *St. James's*, other than on market-days and *Saturdays*, when he received his meat and drink with his master in *St. John's*, but that he never lodged one night with his said master, or elsewhere, in the parish of *St. John*, during the said apprenticeship or service aforesaid. And further, it was sworn on behalf of *St. James's*, that the said monies payable to the said father by virtue of the said indenture were paid accordingly,

THE KING
against
THE PARISH
OF ST. JOHN
THE BAPTIST.

ingly, and were in lieu and consideration for his maintenance and lodging as aforesaid. The sessions therefore quash the said order, being of opinion, that the pauper gained a settlement in *St. John's* parish by the apprenticeship (a).

(a) The court of King's bench quashed the order of sessions, they being of opinion, that binding and serving alone is not sufficient, but that there must also be an *inhabitaney* to gain a settlement by apprenticeship, S. C. 1. Stra. 594. S. C. 2. *Ld. Ray* 1371. the words of the statute 3. *Will. & Mary*, c. 11. s. 8. being, "that if any person shall be bound an apprentice by indenture, and *inhabit* in any town or parish, such binding and *inhabitaney* shall be adjudged a good settlement." S. C. *Const's Dett* P. L. 2 vol. 563. pl. 503.; *Rex v. Radcliffe*, 2. *Strange*, 60.; and therefore if an apprentice serve in one place, and reside at another, he gains a settlement at the

place where he resides forty days, *Rex v. St. Peter's*, 2. *Const*, 565. And in the above case the Court held the parties settled in *St. James's*, S. C. *Foley*, 220. S. C. *Sett. & Rem.* 120. and the residence shall be taken to be where he sleeps a-nights, *Rex v. Castleton*, *Burr.* S. C. 569. *Rex v. Chick*, *Burr.* S. C. 782.; and therefore if an apprentice live with his master forty days in one parish, and then forty days in another parish, he is settled in that parish in which he sleeps the last night, *Rex v. Brichtelmstone*, 5. *Term Rep.* 138.—See also *Rex v. Lowells*, *Burr.* S. C. 825. and *Rex v. Hulland*, *Dougl.* 656. *Cald.* 118.

Case 197.

The King against Cracker.

The defendant was found guilty upon an information in nature of a *quo warranto*, for usurping the office of mayor, and fined.

THIS was a motion for a rule on the under-sheriff of *Cornwall*, to execute a *capias pro fine* imposed on the defendant *Cracker*; and that he might make the return immediately, and attend with it in court, or otherwise shew cause why he has not executed it.

This *Cracker* was found guilty upon an information in nature of a *quo warranto*, for usurping the office of mayor of *Tregony*, in *Cornwall*, for several years successively.

* [286] And now a rule was made, that the sheriff should return this writ within ten days, or shew cause why an attachment should not go against him.

But the sheriff brought *Cracker* in on the day the writ was returnable, and he was committed to the king's bench prison until the Court should consider what fine to set on him, which was suspended until the Term following; and a rule was made, that he should be carried down to *Tregony*, at the next election-day for a mayor, in order to proceed to an election, which was done; and upon a *mandamus* directed to him for that purpose, viz. to elect and swear a new mayor, he returned, that T. S. was duly elected mayor, and that he was willing to swear him into that office.

But he having misbehaved himself in this election, there being no more than two who voted for the new mayor, who was unwilling to take the office upon himself, lest he should be prosecuted upon an information for usurping the office, he refused to be sworn; so this *Cracker* continued mayor still, having been mayor, though he was six months in prison.

And

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And for this misbehaviour he was found guilty, and fined two hundred pounds, and to stand committed until he paid it.

THE KING
against
CRACKER.

The King against Pyke.

Case 198.

A RULE was made for the defendant *Pyke*, and one *Prideux*, to shew cause by what authority they claimed to be capital burgesses of the corporation of, &c. and another rule for an information in nature of a *quo warranto* against this *Pyke* and one *Harrison* (the two contending mayors), to shew cause by what authority they claim being mayors of the corporation, &c.

Information not granted where there has been a peaceable possession of burgess-ship for fourteen years.

It was now moved to make both these rules absolute.

It is true, the defendants have sworn that they have been fourteen years in possession of the capital burgess-ship, under a pretended election of them into that office; but since the election of a mayor very much depends on their being duly elected burgesses, it was insisted, that the Court would grant this information, as they did in the case of the corporation of *Penryn*, notwithstanding a long acquiescence.

See the statute
32. Geo. 3. c. 58.

E contra. * The objection in this case is not like that in the case of the corporation of *Penryn*, because here was fourteen years peaceable and uninterrupted possession, therefore the rule was discharged as to them, and that no information should be granted, but that the rule should stand against *Pyke* and *Harrison*, the contending mayors.

* [287]

And an information in nature of a *quo warranto* being granted against them,

It was said, that upon the trial of that information, and if the Court should deny to grant an information against the capital burgesses, they will contend that the prosecutor cannot give any disability of theirs in evidence, and therefore would be good witnesses against him.

See *Rex v. Stacey*, 1. Term Rep. 1. Espin. Dig. 698.

To which it was answered by THE COURT, that the right of a man shall not be tried in any collateral action to which he is not a party, therefore the disability of *Prideux* cannot be given in evidence on the trial of this issue; so the rule against him as capital burgess was discharged.

The King against The Parishioners of Wilby.

Case 199.

UPON A MOTION to quash an order of settlement made by two justices, and which was confirmed upon an appeal to the sessions, the case appeared to be thus:

If a man build a cottage upon a waste, without any licence, and

after thirty years enjoyment die possessed, his heir at law gains a settlement by residing forty days in such cottage after his death.---S. C. Stra. 608. S. C. 2. Self. Cal. 122. And 5. 19. Vinet, 172.

THE KING
against
THE
PARISHIONERS
OF WILBY.

One *Humphrey Carr*, about thirty years last past, built a cottage in the parish of *B.* on the waste of a manor belonging to the *Earl of Pembroke*, but without any licence or order so to do, and he enjoyed the same during his life, without any other right, and then died, leaving issue *Elizabeth*, his only daughter and heir, who intermarried with *John Darby*, who with his wife *Elizabeth*, being seised of this cottage, sold it to *John Willy* for thirty pounds (a).

The question was, Whether this marriage had gained a settlement of *John Darby* the husband.

IT WAS INSISTED that it had not, because the father of *Elizabeth*, the wife of this *Darby*, had no settlement there, for his entry was by *disseisin*, which gains no settlement; and if the father had none, his daughter could not have any settlement there.

But THE COURT were of another opinion, because thirty years possession is a good title against the lord of a manor, by virtue of the statute of Limitations, if he should bring an ejectment to recover the possession (b). * Besides, *Elizabeth*, the wife of this *Darby*, and daughter and heir of *Humphrey Carr*, was in possession by descent, which is a good title against any escheat the lord might have at common law, and therefore her husband gained a settlement by this marriage (c).

(a) See 9. Geo. 1. c. 7. s. 5.

(b) *Stocker v. Eerney*, 1. Ld. Ray.

741.

(c) See *Rex v. Garway*, Burr. S. C.

632. *Rex v. Button*, Burr. S. C. 631.;

and *Rex v. Brungwyn*, 2. Bott's P. L.

637. pl. 567.

Case 200.

Crosse against Talbot.

A person who is only retained as the servant of an ambassador is not protected from arrest.

MOTION, on behalf of the defendant, to set aside the bail-bond given upon his arrest, and that common bail might be accepted for him; and he obtained a rule to shew cause.

His affidavit shewed, that he was retained as *valet de chambre* to *M. Hoffman*, the *Duke of Holstein's* resident here, at twelve pounds twelve shillings per annum wages, and ten shillings a-week board wages; and a certificate of this was produced, under the Resident's own hand; but it did not appear that he either lay in the house, or actually executed the office.

THE COURT held, that he ought to be a *domestic servant*, and really to execute the duty of his office, and that being a mere nominal servant was not sufficient (a).

And they discharged the rule.

A great many cases have been since determined upon the same principle; but it was in those cases holden, that the idea of a

(a) Where a person does not execute the office for which he hath his certificate, but only gets himself entered upon the list

to have the benefit of a protection, the Court will not endure it. *Barnard. K. B.* 79. See id. 401.—NOTE to former edition. domestic

Trinity Term, 10. Geo. 1. In B. R.

domestic servant was not confined to his lying in the foreign minister's house, provided he is a real servant to him, and actually performs the service (a).

CROSBY
against
TALBOT.

(a) See Grotius De Jure Belli et Pacis, bk. 2. c. 18. f. 8. ; the statute 7. Anne, c. 12. ; and the cases of Evans v. Higgs, 2. Str. 797. Ld. Raym. 1524. Widmore v. Alvares, Fitzg. 200. Heathfield v. Chilton, 4. Burr. 2015. Poitiers v. Croza, 1. Black. Rep. 48. Triquet v.

Bath, 3. Burr. 1478. Malachi Carolina's Case, Wilk. 78. Holmes v. Gordon, Cases T. H. 2. Lockwood v. Cosgarne, 3. Burr. 1676. Tidd's Practice, 42. Hopkins v. De Roebuck, 3. Term Rep. 79.

Seviniack against Marshall.

Case 201.

THIS was an action brought against an administratrix, who pleaded, that she had not assets *die impetrationis brevis originalis*, when the action was brought by bill, and not by original ; and for this cause the plaintiff demurred, and had judgment.

Plea by an ad-
ministratrix, not
good.

The King against Smart.

Case 202.

UPON A CERTIORARI to remove an indictment, the defendant entered into a recognizance to try it at the next assizes, which he could not do by reason of the indisposition of some witnesses.

The estreating a
recognizance
was stayed, for
that the defend-
ant could not get
his witnesses,
who were sick.

And this appearing to the Court upon affidavit, it was moved to stay the estreating of the recognizance :

See stat. 4. Geo. 3.
c. 10. for the
more easy dis-
charge of recog-
nizances estreat-
ed into the ex-
chequer.

Which was granted upon payment of costs, and entering into a rule to try it at the next assizes following, especially since the prosecutor can get nothing by the estreat of the recognizance, but now he gets his costs.

* [289]

* Paterfon against Dyer.

Case 203.

A DECLARATION was delivered in Michaelmas Term, and rules given for pleading according to the course of the court ; but the defendant making default, the plaintiff's attorney signed judgment, and gave due notice of executing a writ of inquiry.

A judgment by
default shall not
be impeached
where the de-
fendant made
defence upon the
writ of inquiry.

The defendant appeared at the time and place, and made defence.

But some time afterwards he would impeach the judgment ; but it was not allowed, because he had made defence at the executing the writ of inquiry.

Anonymous.

Case 204.

Anonymous.

Where the defendant ought to plead in chief.

THE DEFENDANT had leave to plead *de novo* within four days, within which time he ought to have pleaded *in chief*; but instead of that he pleaded an outlawry of the plaintiff in disability, &c. and thereupon the plaintiff signed judgment for want of a plea *in chief* within the four days.

And this was held regular. But upon payment of costs, and giving the plaintiff judgment in debt for his security. and bringing twenty pounds into court, and pleading to issue immediately, the judgment was set aside.

Case 205.

The King against Purfell.

The Court will grant a new trial in perjury, if the defendant was convicted by surprise.

THE DEFENDANT being prosecuted for oppressing an honest man, under colour of a warrant of THE CHIEF JUSTICE, was ordered to answer upon *interrogatories*; and upon his examination he forswore himself, and was indicted and convicted of perjury.

And now he moved to set aside the conviction, it appearing upon *affidavit* he could not be ready to make any defence at the trial.

And upon this motion the verdict was set aside upon payment of costs, and entering into a rule to try it forthwith.

• [290]

Case 206.

Addison against Paterfon.

The bail cannot plead the misnomer of the principal in abatement.

ONE Charles Fountaine was arrested at the suit of the plaintiff, and the bail-piece was thus marked: "PETRUS FOUNTAINE *traditur in ballium, &c. qui arrestatus fuit per nomen CAROLI FOUNTAINE;*" and in the recognizance of bail it appeared, that they were bail for *Peter Fountaine*.

And now upon a *scire facias* brought against them, both the principal and bail plead this matter in abatement.

It was moved to set aside this plea, because the bail cannot plead this in abatement; besides, the principal and his bail cannot join in one plea.

THE COURT was of opinion, that the bail could not plead this *misnomer* in abatement, though the principal might.

So a rule was made for the defendant to answer over.

Springett *against* Chadwick.

Case 207.

INDEBITATUS ASSUMPSIT for several things due to the plaintiff; to which declaration the defendant pleaded in bar, that he gave a note of twenty pounds to the plaintiff in full satisfaction of the debt, &c.

A note cannot be pleaded in bar to an *indebitatus assumpsit*.

Dyer, 75.

6. Co. 44.

Cro Jac. 650.

1. Mod. 225.

2. Will. 86.

And upon a demurrer to this plea the plaintiff had judgment, because a note thus given is no discharge of a debt or a duty.

261. 4. Mod. 42. Stra. 416.

Palmer *against* Byfield.

Case 208.

A RECOGNIZANCE was taken before a Judge of the court of king's bench, at his chambers in *Serjeants-Inn*, in *Fleet-Street, London*, and afterwards a *scire facias* was brought, directed "To the sheriff of *Middlesex*," without mentioning that the recognizance was enrolled.

Recognizance taken in *London*, and *scire facias* on it to the sheriff of *Middlesex*.

And now it was moved to quash the proceedings on this *scire facias*, because it will not lie into *Middlesex* upon a recognizance taken at a Judge's chamber (a).

And THE COURT was of that opinion; but that if the recognizance had been enrolled, the *scire facias* would have been good, either into *London* or to *Middlesex*, at the election of the party; but if not enrolled, then it lies into *London* only.

(a) Allen, 9.

Clerk *against* Dier.

Case 209.

IN AN ACTION ON THE CASE for these words spoken negatively, viz. "I never came home and poxed my wife;"

Words negatively spoken, not actionable.

The plaintiff had a verdict.

1. Com. Dig.

261.

But the judgment was arrested by the opinion of THE WHOLE COURT, for that the words were too loose to bear an action.

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* Saladine *against* Sir Jacob Jacobson.

Case 210.

THE DEFENDANT was one of the directors of the *South-Sea Company*, and the plaintiff had obtained a judgment against him for a thousand pounds. By the statute 7. Geo. 1. c. 1. s. 5. it is enacted, "That every director, &c. shall deliver on oath, before one of the barons of the exchequer, before 25th March 1721, two inventories of all the real and personal estate of which he was possessed or entitled unto in his own right, or of any other person in trust for him, &c. which shall discharge him from the demands of all other persons; all which estates shall be forfeited and recovered by virtue of that act, and shall be paid into

Judgment against a director of the *South-Sea Company* set aside.

SALADINE *against* "into the exchequer, and applied for the benefit of the *South Sea*
SIR JACOB " *Company.*"
JACOBSON.

And now it was moved for the opinion of the Court, whether the defendant could avoid this judgment upon his own affidavit that he gave in a true inventory pursuant to the act.

THE COURT. All that is required in this case by the statute is, to give an exact and true inventory, and he swears that he gave an inventory pursuant to the act, so need not name all the particulars; and it is absolutely necessary that his evidence should be taken, because he best knows whether the inventory was true, or not. So the judgment against him was vacated.

Case 211.

The King *against* Powell.

Whether an ancient custom shall be good against a charter.
S. C. ante, 165.
102.

UPON A MOTION for a trial at bar it was offered for cause, that a jury who had tried this very cause against one *Jones*, had found directly against the charter of this corporation, viz. that foreigners might be chosen to all the offices therein, by virtue of an old custom antecedent to their charter.

S. C. 3. Bro.
P. C. 428.

But the rule for a trial at bar was opposed, because if it should be granted, it would very much influence the next election of any person into any office in this corporation; besides, this point might be brought before the Court by special pleading.

THE COURT. Or by a special verdict found at the assizes, and directed by the Judge; so there is no occasion for a trial at bar, especially since there is nothing in this case to be tried but a point

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* in law, viz. Whether an ancient custom shall be good, and prevail against the express words of a charter.

Case 212.

Shelburne *against* Stapleton.

S. C. ante, 68.
S. C. 1. Stra.
615.
S. C. 3. Bro.
P. C. 89.
S. C. 6. Viner,
438.
S. C. 20. Viner,
5.
Ante, 40. 105.
3. Com. Dig.
"Pleader"
(C. 53.).

THIS was an action brought for a penalty contained in certain articles of agreement, wherein the plaintiff covenanted, that on payment of thirteen hundred pounds to him by the defendant, on or before the shutting the books for the *Christmas* dividend, he (the plaintiff) would transfer upon tender or payment, &c. and the defendant covenanted to receive so much stock, &c. and to pay the money, &c. on or before the transfer-day, on the penalty of so much, &c. And it was further agreed, that upon any default in the defendant, it should be lawful for the plaintiff to sell the said stock at the market-price, and to retain the said sum of thirteen hundred pounds; and if there was any surplus, he (the plaintiff) was to pay it over to the defendant; but if the said stock should be sold at a lower rate than would satisfy that sum, then the defendant was to make up the deficiency.

And now upon an action of debt in the common pleas, the plaintiff declared and set forth this agreement, and that on such a day,

day, before the shutting the books, he was at the *South-Sea House* ready to transfer, and then and there tendered to transfer, and stayed there till the shutting the books; and *licet* he had performed all on his part, the defendant was not there, nor anybody for him, to accept the said tender, or to pay the money; whereupon he sold the stock for three hundred and thirty-two pounds, that being the market-price; and assigned for breach of this agreement, that the defendant had not paid the deficiency, so that he (the plaintiff) is entitled to recover the penalty mentioned in the said articles.

SHELBURNE
against
STAPLETON

The defendant pleaded in bar, that he made a feoffment of lands to the plaintiff in satisfaction of the principal sum, after the penalty was forfeited.

Upon a demurrer to this plea, the defendant had judgment in the common pleas.

And now upon a writ of error brought in the king's bench,

IT WAS INSISTED *for the defendant in error*, that this judgment was given for errors in the declaration; for the plaintiff in the original action had not laid a sufficient breach of this agreement, which was, to transfer the stock on or before the shutting of the books, &c. and that the defendant *superinde* was to pay the money: now the plaintiff had set forth, that the books were open to the twenty-third of *December*, and * that he on that day and hour, before the shutting the books at the *South-Sea House*, tendered to transfer the stock, but did not aver that to be the usual place of tender; so that if no certain and usual place is assigned for a tender, it must be made to the person himself, unless the nature of the thing did ascertain the place.

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Now if a tender is not necessary, then another question will arise, (*viz.*) Whether those are mutual covenants, or not? for if they are, then it must be admitted that each of the parties may maintain an action, without alleging the performance on his part; for if one covenants to do such a thing, and the other covenants to do another thing, each of them may have his mutual action. But that is not this case; for here the second thing to be done so entirely depends on the first, that there is some precedent act to be done to intitle the plaintiff to such second thing; and in such case he must shew that he had done all things by him to be done, before he can bring his action for not doing the other thing; and so is the case of *Thorp v. Thorp (a)*, which was an action on the case on a special agreement, by which the plaintiff agreed to release the equity of redemption of a mortgage, and "all sums of money and demands whatsoever;" and in consideration thereof the defendant agreed to pay seven pounds, &c. and mutual promises were laid; and the plaintiff averred performance on his part, and that the defendant had not paid the money; the defendant pleaded in bar, that after the promise the plaintiff had released "all

(a) Lutw. 245. — See Vent. 147. 177. 214. Saund. 319.

SHELFURNE
against
STAPLETON.

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“ demands ;” the plaintiff craved *oyer* of the release, which was of the equity of redemption, and of “ all actions and demands,” and then demurred to the plea ; and it was insisted to maintain the plea, that the plaintiff having laid mutual promises in this declaration, might bring an action for the money before this release was executed, and if so, then the release is a good bar to the action, which is very true in some cases where mutual promises are laid, but not in this, because the release was part of the agreement, *viz.* “ it was agreed that the plaintiff should execute a release, “ &c. ;” and it was upon that consideration that the defendant agreed to pay the seven pounds ; therefore the release was to precede, and until that was executed the plaintiff had no cause of action ; therefore it would be absurd to say, that the release shall discharge that very duty which it created. So in the principal case, the plaintiff covenanted, that he would transfer the stock, on payment of so much money on or before the shutting the books, &c. and the defendant covenanted to receive the transfer, and to pay, or cause to be paid, *ad tunc proinde* ; so that he is not to pay the money until an actual transfer, or a lawful tender to transfer ; therefore the tender is in nature of a condition precedent, and is absolutely necessary in this case ; and if that be not well laid in the declaration, the plaintiff can have no cause of action. It is true, where the covenants are mutual an action will lie for either of the parties, without averring performance on his part, though one is the consideration of the other, and though *pro* or *in consideratione*, &c. is in the declaration ; but that is not this case, for here the defendant agreed to accept the transfer of the stock, and *ad tunc proinde* to pay the money ; so that the plaintiff cannot maintain an action, unless the stock was transferred, or the tender to transfer was well laid in the declaration. Besides, he should have laid a special performance on his part, and not by such a general allegation as *licet* he had performed ; all which was to be done on his part ; for the action will not lie without alledging a special performance.

Cro. Car. 384.
Vent. 114. 126.

TO WHICH *it was answered*, that though the averment of performance was general, yet the pleading over of a collateral matter had made that general allegation good, it being bad only in form. Besides, here is a certain time appointed for the performance of this agreement on the defendant's part, *viz.* on payment of thirteen hundred pounds, &c. on or before the shutting of the books for the *Christmas* dividend, and the defendant agreed to accept so much stock, and to pay the money ; now if either of the breaches are well laid, *viz.* the non-acceptance of the transfer, or the non-payment of the money, the plaintiff is entitled to this action. But it being farther agreed, that upon any default in the defendant it should be lawful for the plaintiff to sell the stock, and if the money arising by such sale would not satisfy the said thirteen hundred pounds, then the defendant would make up the deficiency ; if all the rest was out of the case, the plaintiff is entitled to sell the
stock,

stock, and to maintain this action against the defendant in not paying the deficiency, according to his covenant.

SHELburnE
against
STAPLETON.

THE COURT. The case was thus : An action of debt was brought for a penalty mentioned in articles of agreement, &c. in which the plaintiff declared, that by indenture, &c. *testatum fuit* that he sold *South-Sea* stock to the defendant, and covenanted to transfer the same before the shutting the books for * the *Christmas* dividend ; and that the defendant covenanted to receive and pay for the said stock before that time ; but if he did not, then the plaintiff might sell it ; and if the money arising by such sale would not make up thirteen hundred pounds, then the defendant agreed to supply the deficiency, for which the action was now brought. It was objected, that by this agreement the plaintiff was to transfer the stock, which the defendant agreed to receive ; so that unless the stock were actually transferred, or a lawful tender made to transfer it, the defendant was not bound to pay the money ; and it was argued, that this was not a lawful tender, because the plaintiff set forth that it was made at the *South-Sea House*, and did not aver, that that was the usual place to make such tender ; but yet the plaintiff is entitled to this action, because these are mutual covenants, and either party may maintain an action for non-performance. It has been likewise objected, that the money was not to be paid until a transfer was made of the stock, and an acceptance of that transfer ; but this is a wrong construction of the covenant, for he was to pay the money before the shutting the books for the *Christmas* dividend, and not on the acceptance of the transfer ; for otherwise it would be in his power to pay, or not to pay, which would be inconsistent with his covenant ; therefore, in construction of this covenant, the intention of the party is to be a guide, and so far to govern as not to make the agreement repugnant in itself ; and here the intention was plain, that on non-payment of the money the plaintiff might have this action. Besides, the time of entering into this covenant is to be considered, and that was when the stock became an uncertain estate, as it was then ; therefore the party agreed to have the money payable first.

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The judgment of the common pleas was reversed ; and the judgment of the king's bench was reversed in the house of lords.

Williams against Green.

Case 213.

JUDGMENT AGAINST THE PRINCIPAL, and a *scire facias* was brought against the bail, and upon two *nibils* returned there was judgment against the bail ; and afterwards an action of debt was brought against one of the bail for all the money due to the plaintiff.

Debt lies against
bail jointly, or
each severally.

IT WAS OBJECTED, that this action would not lie against one of the bail, because the judgment against them is joint.

WILLIAMS
against
GREEN.

* IT WAS SAID *on the other side*, that the action was brought upon the recognizance of bail, which is joint and several, and consequently good, either joint or separate ; and so is the case of *Cornish v. Clerke* (a), in *Michaelmas Term*, in the tenth year of *George the First*.

And so was the opinion of THE COURT in this case (b).

(a) Ante, 199.

(b) See 1. Lev. 225.

Case 214.

Herbert against Morgan.

Motion in arrest
of judgment for
excessive dama-
ges denied.

THE PLAINTIFF was arrested at the suit of the now defendant in a fictitious action, without any colour of reason ; and afterwards he brought an action of false imprisonment against the defendant, and the jury gave him eighty pounds damages.

And upon a motion in arrest of judgment, because the damages were excessive, it was opposed by the plaintiff's Counsel, and insisted, that he might have the benefit of the verdict.

Which was granted, and accordingly the plaintiff had judgment.

Case 215.

The King against Recves.

Indictment
quashed.

UPON A MOTION to quash an indictment, for that it was "*præsentatum existit quæ billa est vera*," instead of "*quod billa est vera*," a rule was made to quash it *nisi causa*, but no cause was shewn ; and so the indictment was quashed for that fault.

TRINITY TERM,

The Tenth of George the First,

I N

The Court of Exchequer.

Sir Jeffery Gilbert, Knt. Chief Baron.

Sir Francis Page, Knt.

Sir William Banister, Knt.

Sir Bernard Hale, Knt.

} *Barons.*

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Morgan's Case.

Case 216.

IN TRESPASS for taking his cattle, &c. the defendant justified as Custom, where servant to one *Morgan*, setting forth, that *Morgan* was seized it is well pleaded of the manor of *D.* in fee, to which A COURT-LEET did ed; where amerciaments are belong, &c. and that time out of mind there had been a custom, to be assessed, where not. that *quilibet tenens* of a freehold tenement, and who was a resident and an inhabitant within that manor, ought, upon notice or summons, to appear personally at the said court-leet three times in every year, viz. at the Feasts of *St. Michael* and *St. Hilary*, and at *Easter*; and for default of appearance at the said courts, to pay to the steward of the said leet, to the use of the lord, seven shillings for every default; and that if he did not appear at two of the said courts, but did appear at the third, then to pay an *essoin-penny* only; and farther, that if any such tenant, being summoned * to be of the grand jury, should not appear, that then he should be amerced seven shillings by the steward, and that the bailiff of the manor, by warrant from the steward, might distrain for such amerciaments, and sell the distress, &c. Then he sets forth, that the plaintiff was summoned to appear at two several courts, and made default; and that he was likewise summoned to be of the grand jury, &c. but did not appear at that court; for which defaults he was amerced

S. C. Gilb. Eq. Rep. 209.

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MORGAN'S
CASE.

twenty-eight shillings; and because it was not paid, *Richard Hughes*, steward of the said leet, made his warrant, directed to the defendant, to levy the same by distress and sale of the plaintiff's goods, *virtute cuius* he distrained the cattle, &c. and sold them, and paid twenty-eight shillings to the steward, for the use of the lord of the said manor, *quæ est eadem transgressio, &c.*

And upon a demurrer to this plea, several exceptions were taken to it.

FIRST, That the custom was void, because it was laid too general.

SECONDLY, That it was void, because it is for the steward to amerce without any *affeerment*.

THIRDLY, That here was a double amerciamment for one and the same default at one court, *viz.* in not being of the homage, and not appearing at that court.

As to THE FIRST EXCEPTION, this custom is void, because it is laid too general, *viz.* that *quilibet tenens, &c.* used and ought to appear, without exception of the quality, degree, or sex of persons, whereas several are exempted from appearing and attending at the leet, both by the common law and statutes of this realm; as infants under the age of twelve years, and this is by the common law (a); and ecclesiastical persons are exempted by the *statute of Marlbridge* (b), *viz.* archbishops, bishops, &c. are not to appear at the sheriff's tourns, and consequently not at leets, which were derived out of the tourns; and if they should be distrained for any amerciamment, &c. for not appearing in the leet, they have a writ upon the statute by way of privilege (c); for as they are not obliged by law to appear at leets, so they are not amerciable for not appearing; therefore this custom being general, and not setting forth these exemptions, is void, and cannot subsist against the *statute of Marlbridge*, which is introductory of a new law, and destroys all customs and prescriptions against it (d).

[298] * SECONDLY, This custom is void, because it is laid for the steward to amerce without an *affeerment*; and this is directly against MAGNA CHARTA (e), by which it is enacted, "that amerciamments shall be assessed by lawful men of the vicinage," *i. e.* shall be assessed by those lawful men appointed in courts-leet, upon oath, to settle and moderate the amerciamments of such who have committed faults arbitrarily punishable, and have no express penalty expressed by any law or statute; so that to affeer is properly to tax, or to reduce a thing to a certainty by persons on their oaths, and ought to be *per pares*; but this is a certain amerciamment imposed by the steward, without any *affeerment*, and is therefore void.

(a) Co. Lit. 172.

(b) 52. Hen. 3. c. 6.

(c) Fitz. N. B. 165. 2. Inst. 120.

Register, 175.

(d) Co. Lit. 15. a. 2. Roll. Abr. 168.

W. Jones, 270. 290.

(e) Cap. 14.

THIRDLY,

THIRPLY, This is a double amerciamment for one and the same default at the last court; for the plea sets forth, that the plaintiff being summoned to be of the grand jury did not appear, for which he was amerced seven shillings, and he was amerced seven shillings more for not appearing at that court, which is double, and exceeds the custom.

TO WHICH it was answered, as to THE FIRST EXCEPTION, thus: The custom is good and well pleaded, though the exemptions are not set forth in the plea, for that the defendant is not obliged by law so to do; but the person distrained is to shew, that he is exempted from such distress, if he be really intitled to any such exemption, for the custom is *lex loci*; and if there was any exemption, by virtue of the custom, the plaintiff ought to have shewn it. Now to instance a parallel case: Upon disbanding the army, an act of parliament was made, giving privilege to the soldiers to exercise their trades anywhere in *England* (a); now, supposing that there is a custom in the borough of *H.* that no person shall exercise a trade therein unless he is free of that borough, and an action should be brought against a soldier upon a bye-law founded on this custom, certainly the custom may be laid in general, and the exemption must come on the soldier's side; for it is not required, either by the statute or common law, that exemptions should be set out in pleading of customs; but the party who is to have the benefit of an exemption must set it forth, and shew, that he is not within the custom by reason of the exemption. So where a custom was alledged to distrain anything within such an honour, it was objected to be too general (b), because several things are not distrainable, but are privileged and exempted from distresses, viz. *averia carucae*, and goods taken in execution by the sheriff, and workmen's * tools, &c. (c); and the Book tells, it is not necessary to set forth such exemptions, because it is immaterial, and would make the pleadings too long; therefore the person exempted must shew it, and that he is not within the custom by reason of his exemption.

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As to THE SECOND POINT it was argued, that this custom is good to amerce without an affectment; for though it has been objected that it is contrary to MAGNA CHARTA, and that the general rule of pleading in such cases is to set forth an *amerciamment*, and that it was affecter; yet notwithstanding MAGNA CHARTA, and that rule of pleading, there may be an amerciamment by custom to a certain sum, for this statute was made in affirmance of the common law; and therefore though it is in the negative, viz. that no freeman shall be amerced, yet there may be a prescription or custom against it. This was the *Lord Coke's* opinion in his *First Institutes* (d), viz. where a statute in the negative is in affirmance of the common law, a man may prescribe against it:

(a) See 22. Geo. 2. c. 44. 3. Geo. 3. c. 8. and the 24. Geo. 3. sess. 2. c. 6. (c) Co. Lit. 47. 4. Term Rep. 565. 568; Gilb. Dif. 37. (d) Co. Lit. 115. a.

MORGAN'S
Case.

3. Rep. Greif-
ly's Case.

as for instance ; by the statute of MAGNA CHARTA it is provided (a), that leets shall be holden twice a year only, viz. after *Easter* and *Michaelmas* ; yet a man may prescribe to hold them oftener, and at other times, because that statute is but an affirmation of the common law (b). Besides, peers of the realm are within this statute as well as commoners, and the amerciamment of peers is not used at this day, because it is reduced to a certainty by custom, viz. a duke to ten pounds, and others to five pounds, and such custom is good. By the same reason an amerciamment may be reduced to a certainty by custom ; and if such custom be good, then there cannot be any occasion to affect an amerciamment, because to affect is only a taxation reducing that to a certainty which was uncertain before ; but it is absurd to say that a thing shall be reduced to a certainty which was certain in itself before the affectment ; so that the reason of affecting fails in this case, if the sum be reasonable ; but if it be unreasonable, then the custom is void, and cannot stand. It appears by the old books (c), that customs to have particular sums are good ; as a custom that the lord of a manor shall have three pounds for every pound-breach ; this is good against the tenants, though not against strangers ; so in the principal case the sum is reduced to a certainty, and the custom charges the tenants but not strangers ; a man may prescribe to have a certain sum of money from any person* found guilty of an affray in a leet, and such prescription is good. This punishment is here called "an amerciamment," but it is not properly so, but a fine imposed by the Court, whereas amerciamments are always by the jury : now MAGNA CHARTA mentioning amerciamments, for that reason they are to be affected, for the judgment in an amerciamment is general, viz. *quod sit in misericordia*, and afterwards upon estreats directed to the coroner they are affected ; but a fine is not to be affected, because not mentioned in that statute, which is the foundation of all affectments ; and there are authorities in point (d), that an amerciamment imposed by a steward of a leet, which is in nature of a customary fine, need not be affected, though the custom had not ascertained the sum ; therefore there can be no need of an affectment where the sum is made certain by the custom.

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As to THE THIRD EXCEPTION, that the plaintiff is doubly amerced for one and the same fault, it is not so ; and this appears by setting forth the custom, viz. that every tenant who shall not appear, &c. being summoned to be of the homage, shall pay seven shillings, and if he do not appear at two of the said courts, and appear at the third, he shall pay an *essoins-penny* ; but if he do not appear at the third, and pay the *essoins-penny*, he shall then pay seven shillings for each of those defaults. But the custom is not laid to amerce for non-payment of the *essoins-penny*, for that was not

(a) Cap. 35.

(b) Plowd. 465.

(c) Year Books 12. Hen. 7. pl. 14.
22. Hen. 7. pl. 40.

(d) Year Book 10. Hen. 6. pl. 7. Bro.
"Amerciamment," 50.

to be paid but where the party neglected to appear at two courts, and appeared at the third; but here was a total neglect, for the defendant did not appear when he was summoned to be of the homage, nor at two other courts, nor at the third court. The custom being, that if he did not appear at that court, and pay the *essoins-penny*, then for every default he should pay seven shillings, must be understood for every default in not appearing, &c. and not for non-payment of the *essoins-penny*; so that this is not a double amerciamment for the same default, but several amerciamentments for several defaults in not appearing, &c.

THE COURT. It is agreed, that this custom would have been well laid if the exemptions had been set forth, and not so general that *quilibet tenens* should appear, &c.; but it is certain, that such exemptions which are by the common law, as of infants under twelve years, and women, &c. were never yet set forth in pleading of customs.

But it has been objected, that by the statute of *Marlbridge* clergymen are exempted, and that this custom cannot * prevail against that statute; which is very true; but this does not alter the method of laying a prescription or custom in pleading, which, ever since the statute was made, have been laid without mentioning any exemptions, but generally as in this case. It is true, if any persons had been exempted by the custom itself, such exemption must have been set forth in pleading, because the custom is entire; but it is not necessary to set forth any other exemptions; therefore this custom is well laid. The *statute of Marlbridge* never intended by those exemptions of ecclesiastical persons to destroy *leges loci*; but those laws still remain as they did before, and persons who will have any advantage of them must plead them; for it is the nature of exemptions to be exceptions out of the general rule; and it would be not only informal, but unreasonable, to set them all forth in pleading.

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So as to the first point, THE COURT WERE ALL OF OPINION, that the custom was well pleaded.

As to the second point IT WAS AGREED, that amerciamentments are to be affeered, unless they are in nature of a fine, and that there is no occasion for an affeement, but where the amerciament is discretionary, which is not this case; for here the sum is ascertained by custom, and the steward cannot increase or diminish it; and therefore this amerciament ought not to be affeered: first, Because it is in the nature of a fine for a contempt; secondly, Because the custom has ascertained it, and it is not discretionary; and of this opinion were THE CHIEF BARON and two more.

But THE OTHER BARON differed, for he was of opinion, that if the custom be abrogated by MAGNA CHARTA, then this amerciament must be affeered, and that the custom was abrogated by that statute, by which it is enacted, "that all amerciamentments shall be affeered *per pares*." It is true, fines are not within this statute, but amerciamentments are, and a fine is a ransom from imprisonment; and
wherever

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wherever a leet may imprison, it may assess a fine, as a price to redeem the party from an imprisonment, and a commitment always follows a fine ; and therefore a *capiatur* lies for fineable offences ; but in amerciaments, where the judgment is that the party shall be *in misericordia*, as it is in this case, there they are to be assessed. It is true, the amerciaement of peers is made to a certain sum, but it is by order of the house of lords ; and this was to prevent the frequent application to the house when a * peer was to be amerced ; but the principal case being only a nonfeasance, and no breach of the peace, or contempt of the court, the steward cannot set a fine for it ; and if so, then it falls back to an amerciaement, and must be assessed *per judicium parium*.

As to THE THIRD POINT, that here is a double amerciaement for one default, THE CHIEF BARON was of another opinion, for amerciaement was in two instances, *viz.* for a default in not being of THE GRAND JURY, and for a default in not appearing at that court ; and where a man is bound to appear in two respects, and doth not appear, those are several defaults.

And ANOTHER BARON was of the same opinion, *viz.* that it is not a double amerciaement for the same default ; for if an officer who ought to attend the court by virtue of his office, and likewise as a grand-juryman, should make default, he is to be fined in both respects ; and in one there is no consideration to be had of the other ; therefore, notwithstanding this objection, the plea is good.

But TWO OF THE BARONS were of opinion, that this custom was void for the reasons following, *viz.* every custom must have a reasonable commencement, which this custom had not ; for it being, in time immemorial, seven shillings is too great a sum to pay for such a default ; besides, it is unreasonable, because it involves every person in it, when some persons may have a reasonable excuse to be absent ; as for instance, a sheriff may be called to attend on the king's person, &c.

Adjournatur (a).

(a) The Court took time to consider of this case ; and in Hilary Term, 12. Geo. 1. GILBERT, Chief Baron, delivered the opinion of himself and the

other Barons, that this custom was not good, for the reasons assigned. S. C. Gilb. E. R. 211.

TRINITY TERM,

The Tenth of George the First,

I N

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powis, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt.

} *Justices.*

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Stamper *against* Hodson.

Case 217.

THE PLAINTIFF having obtained judgment in debt against the defendant, sued out a *fieri facias*, and likewise a *capias ad satisfaciendum* at the same time; and thereupon the defendant was taken in execution.

If a *fi. fa.* and a *ca. sa.* be taken out, the *fi. fa.* cannot be executed after the party is taken on the *ca. sa.*

It was now moved to quash the *fieri facias*.

THE COURT was of opinion, that the plaintiff might, for his own security, take out two writs, but he can execute but one; therefore this writ of *fieri facias* was quashed.

I. Vezey, 1795.

* [303]

* Page *against* Barns.

Case 218.

BY THE STATUTE 4. & 5. *Anne*, c. 16. for the amendment of the law, it is enacted, "that actions of account may be brought against a bailiff or receiver, for receiving more than his just share."

Where *wager of law* will lie.

An action of account was brought upon this statute against the defendant, as bailiff *ad merchandizandum*, who *waged his law*.

Upon demurrer it was objected, that *wager of law* would not lie in account against a bailiff *ad merchandizandum*; but if such action

PAGE
against
BARNES.

action had been brought against a receiver, and the plaintiff did not shew by whose hands, there *wager of law* would lie.

And so IT WAS ADJUDGED in this case for the plaintiff.

Case 219.

Gravenor *against* Salter.

Objections in
ejectment after
verdict over-
ruled.

Ld. Ray. 771.
1. Com. Dig.
"Amendment"
(L. 2.).

ERROR TO REVERSE A JUDGMENT in ejectment after a verdict.

SIMONS excepted to the declaration ; for that the writ recited therein had mistaken *the plaintiff* for *the defendant*, and so charged a demise of the lands to the defendant, instead of charging it to the plaintiff ; and the declaration pursues the writ by referring thereunto, as *demisit tenementa prædicta* ; or else it is void for uncertainty.

SECONDLY, The *venire facias*, as contained in the *postea*, is ill, for the words are only *ad veritatem infra content. electi, triati, et jurati, dicere super sacramentum suum quod, &c.* omitting *dicend.*

BUT THE COURT over-ruled these objections, and affirmed the judgment.

Case 220.

Salter *against* Grosvenor.

If an aggregate
corporation con-
sist of two bai-
liffs and bur-
gesses, &c. the
two bailiffs make
but one office ;
and if a lease
be made by
one of them, in
his political ca-
pacity, to the o-
ther, it is void.

IN EJECTMENT, &c. the case was thus : A corporation aggregate consisted of two bailiffs and burgeses, &c. and one of the bailiffs and the burgeses made a lease, in their political capacity, to the other bailiff in his natural capacity.

The question was, Whether this lease was good, or not ?

IT WAS ARGUED, that it was void, because the bailiffs are an integral part of the corporation, and they both make but one officer (a) ; and therefore where one is severed in any corporate act, it makes that act void ; for if one bailiff could do a corporate act separately, this inconvenience would naturally ensue, *viz.* they might act directly contrary to each other ; and therefore the meaning and intent of the charter in making two bailiffs was, that they should be both present, and concur in every corporate act. And for this purpose the case of *Wood v. The Mayor of London* (a) was cited, where debt was brought in the court of the mayor and aldermen of London, for a penalty upon a bye-law made by the common-council ; and it was for four hundred pounds penalty, of which three hundred pounds was to be to the use of the mayor and commonalty ; and it was held, that this suit in the mayor's court

(a) 11. Co. 2. 1. Show. 289. 2. Mod.
23. 3. Lev. 399. Carth. 145. Cro.
Eliz. 625. ; and see *Smith v. Powdick*,
Cowp. 197.

(b) 1. Salk. 397. Pl. 3.

Trinity Term, 10. Geo. 1. In B. R.

was proper, if he could be severed, and the court could be held before the aldermen ; but he being an integral part, so as no court could be held without him, it could not be sued for in his court, for then the same person would be both plaintiff and judge.

SALTER
against
GROSVENOR.

* THE COURT was of opinion, that a sole corporation, as a bishop or a parson, could not make a lease to himself, because he cannot be both lessor and lessee (a) ; and the law is the same in a corporation aggregate, as dean and chapter, for a lease cannot be made by *the chapter* without the concurrence of *the dean* ; and for the same reason, a lease cannot be made to *the dean* without the concurrence of *the chapter*, but it may be made to any of *the prebendaries*, because it is not necessary that any of them should join in the lease, for a *prebendary* is not an integral part of the body corporate. But in the principal case the bailiffs make but one officer, and the one cannot act without the other ; therefore if a lease be made by the corporation to one of them, he is both lessor and lessee, which cannot be. If process should be directed to the sheriffs of *London*, and one dies, the process is gone, because one sheriff cannot act without the other, for they both make but one sheriff.

[304]

And for these reasons THE WHOLE COURT was of opinion, that this lease was void ; and judgment was given accordingly.

(a) Year Books 13. Hen. 3. pl. 10. 14. Hen. 3. 2. 29. Dyer, 304. Cro. Jac. 234.

MICHAELMAS TERM,

The Eleventh of George the First,

I N

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*

Sir John Fortescue Aland, *Knt.* } *Justices.*

Sir Robert Raymond, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*

Sir Clement Wearg, *Knt. Solicitor General.*

Barnsly against Shrimpton.

Case 221.

A WRIT OF ERROR was brought, and the general error assigned, and likewise the want of an original, and a warrant of attorney.

After a plea in *nullo est erratum*, it is never admitted to amend general errors.

After *in nullo est erratum* pleaded, a rule of court was obtained to amend the errors assigned.

1. Lev. 30.

But it was discharged upon a motion for that purpose; for after such a plea it is never admitted * to amend general errors; it is like *not guilty* pleaded by the defendant, who is never admitted after such a plea to justify, or to plead specially.

* [305]

Cowper against Ginger.

Case 222.

THE PLAINTIFF obtained judgment against two defendants in an action of debt, and one of them brought a writ of error, it should have been brought by both, and he who did not execute ought to have been summoned and severed; which not being done,

If judgment in debt be against two defendants, both must join in a writ of error.

S. C. post. 317. S. C. ante, 16. 81. S. C. 1. Stra. 606. S. C. 2. Ld. Ray. 1402.

Michaelmas Term, 11. Geo. 1. In B. R.

COWPER
against
GINGER.

This was held to be a fault not amendable.

And thereupon the writ of error was quashed. The like judgment was given in *Hilary Term*, in the sixth year of *George the First*, in the case of *Brewer v. Turner (a)*.

(a) *Str.* 232. See also *Vavasour v.* 3 *Burr.* 1792. *Larosh v. Walsborough*, *Vaux*, 1. *Will.* 38. *Knex v. Costello*, 2. *Term Rep.* 738.

Case 223.

Bond against Turner.

Proceedings on a *scire facias* against bail shall be stayed if there were only four days between the *teste* and the return of *fi. fa.* against the principal.

JUDGMENT was obtained by the testator, who died, and his executor sued out a *scire facias* against the defendant, and had judgment therein, and then he sued out a *capias ad satisfaciendum* against him, and upon *non est inventus* returned, he sued out a *scire facias* against the bail.

And, upon a motion made to stay the proceedings against them, as being irregular, because there were but four days between the *teste* and the return of the *scire facias* against the principal, that motion was granted.

Str. 419. 443.
1. *Com. Dig.*
"Bail" (R. 1.).
1. *Burr.* 340.

And then the plaintiff moved to quash all the proceedings for his own expedition, which was likewise granted upon payment of costs.

Case 224.

Savill against Snell.

In covenant to find board and lodging or to pay 10l. the defendant may pay the money into court.

IN AN ACTION OF COVENANT in certain articles of agreement, wherein the defendant covenanted to find diet and lodging for the plaintiff for a year, or to pay him ten pounds :

The defendant, upon affidavit made that there was not above ten pounds due to him, moved to bring it into court, and that the plaintiff might proceed at his peril.

Salk. 597.
1. *Vent.* 356.
Str. 515. 814.
957.
2. *Burr.* 1120.
3. *Burr.* 1370.

THE COURT could not ascertain what was due for diet and lodging; but because the agreement was in the disjunctive, *viz.* to find diet and lodging, or to pay ten pounds, a rule was made, that the defendant might bring it into court (a).

5. *Com. Dig.* "Pleader" (C. 10.).

(a) See *Hallet v. East India Company*, that wherever the sum demanded is certain, or may be ascertained by computation, without the intervention of a jury, it may be paid into court, 2. *Burr.* 1120.

* [306]

Case 225.

* Henly against Roffe.

After an arrest the plaintiff must declare in two Terms.

THE DEFENDANT was arrested, and no declaration being against him within two Terms after the arrest, he became a *superjudeus* and was discharged, and immediately afterwards

6. *Mod.* 21. 254.
Tidd's Pract. 193.

5. *Com. Dig.* "Pleader" (C. 2.).

Michaelmas Term, 11. Geo. 1. In B. R.

was arrested again by a *capias* out of the common pleas, at the suit of the same plaintiff, and for the same cause of action.

HENRY
against
ROSS.

And upon a motion to discharge these proceedings, because irregular,

THE COURT was of another opinion, for that the defendant had a right to supersede the action, because no declaration was filed against him in time; and as he had a right to supersede that action, certainly the plaintiff must have liberty to proceed in another; for his debt is not lost for want of declaring in time, but only that action is gone, and therefore a new action may be brought.

Lawson against Dickenson.

Case 226.

THE PLAINTIFF had an estate mortgaged to him, and the defendant, who was an attorney, and who drew the mortgage, did by that means get all the deeds relating to the title into his possession, and now refused to deliver them to the plaintiff, unless the mortgagor would pay a debt due from him, as the defendant pretended.

Where deeds are delivered upon a special trust, the party cannot detain them.
Post. 340.

And now, upon a motion for a rule to deliver the deeds to the plaintiff, for that he (the defendant) made the mortgage, and therefore shall not be allowed any money due to him from the mortgagor, before or after the mortgage, but that he should deliver up the deeds upon payment of what is due for drawing and engrossing it;

12. Mod. 516.
Imp. Pract. 69.

THE COURT was of opinion, that an attorney may detain papers until the money is paid for drawing them; but that he cannot detain any writings which are delivered to him on a special trust, for the money due to him in that very business; therefore a rule was made for the defendant to deliver those deeds to the plaintiff.

The like rule was made in the case of *Hooper v. Hayward* (a) this Term, that an attorney should deliver several deeds of lands which he received for a certain purpose, and would have kept them, because he pretended his client had a mortgage on those lands; and the rule was, that he should deliver * them by such a day, or an attachment should go against him; and accordingly he delivered them up on the day, but was ordered to pay costs and such damages to the party, as THE MASTER should think reasonable for what the plaintiff had sustained for want of the deeds; because it appeared that the defendant had received the profits, and kept the plaintiff out of possession by this means. And in the case of *Geary v. Fashion* (b), a rule was granted for an attachment against the defendant for not delivering deeds to the plaintiff; and the like rule in the case of *Strong v. How* (c) for not delivering deeds given to him in order to borrow money on them.

* [307]

(a)
(b)

(c) Post. 339.

Case 227.

Elliott against Cowper.

A declaration stating that *A.* made a promissory note, and that the plaintiff demanded the money of the said *A.* is a sufficient averment of the identity of *A.*

S. C. 1. Stra.

609.

S. C. 2. Ld. Ray.

1376.

AN ACTION was brought against the indorser of a promissory note, wherein the plaintiff declared, that one *Coates* "*fecit notam in scriptis*," omitting the words "*manu sua subscript*," by which he promised to pay to the defendant, or order, so much money, &c.; that the defendant indorsed this note to the plaintiff; and that, although he demanded the money *de eodem Coates*, he did not pay it.

The defendant demurred specially, for that the plaintiff did not set forth that *Coates* of whom the money was demanded, was the same *Coates* who drew the bill.

TO WHICH it was answered, that the declaration sets forth that the note was made by one *Coates*, and that the plaintiff demanded the money *de eodem Coates*, which is a good and certain averment that he was the same person.

And THE COURT was of that opinion.

A declaration on a promissory note, stating that *A.* made the note, imports that he signed it.

SECONDLY, It was objected, that the statute 3. & 4. *Anne*, c. 9. which gives credit to such notes, and a remedy to recover on them where there was none at law, enacts, that "all notes signed by any person, &c." and it doth not appear by this declaration that *Coates* signed this note.

1. Ld. Ray. 512.

2. Ld. Ray.

1542.

TO WHICH it was answered, that the plaintiff set forth that *Coates fecit notam*, which implies signing it; for he could not make it without signing it (*a*).

The plaintiff had judgment.

(a) Same point determined accordingly in *Taylor v. Dobbins*, 1. Stra. 399. See also *Smith v. Jarvis*, 2. Ld. Ray. 1484.

Case 228.

The King against Roberts.

An action will not lie in the Marshalsea for a malicious prosecution in the king's bench.

* [308]

F. N. B. 116.

7. Co. 1.

2. Com. Dig.

"Action of

"Conspiracy"

(C. 2.).

THE DEFENDANT was indicted, and acquitted in this court, and afterwards brought an action in THE MARSHALSEA against the prosecutor for a malicious prosecution; upon which the defendant in the action was held to special bail.

* KETTLEBY now moved to stop the proceedings there, because this Court being possessed of the principal cause, may better judge whether the prosecution was malicious or not.

STRANGE *contra* insisted, that debt lies in THE MARSHALSEA, or in any other inferior court, upon judgments in the court of Westminster (*a*). The reason of suing below, is for the advantage of holding the defendant to bail; and there is a custom in that court, that the attorney shall answer for such bail as he takes; so

that if the proceedings should be stayed, the plaintiff would lose that benefit which he has below against the attorney; for in truth the bail are worth nothing.

THE KING
against
ROBERTS.

THE COURT. It is highly inconsistent to have the reasonableness of suing here determined below; whereas there are any particular circumstances of aggravation, a Judge may require special bail, though the writ does not require it (a). However, if we stay the proceedings below, we will order the defendant to find special bail; which the defendant below agreeing to, the proceedings were stayed.—The Court agreed the cases in *Salkeld* and *Siderfin* to be law.

(a) See 12. Geo. 1. c. 29.

Anonymous.

. Case 229.

AN EXECUTOR moved the Court to enlarge the time for pleading, the rules being out.

An *exceutor*, to obtain time to plead, must undertake not to plead any judgment obtained after his time for pleading expires.

This was opposed, unless he would enter into a rule not to plead any judgments obtained against him after the rules were out; for otherwise he might confess judgments in the mean time, and plead them in bar to the plaintiff's demands.

THE COURT said, they would not deprive the plaintiff of any advantage he had by law to recover his debt, unless the defendant would enter into such a rule; which he refusing, the Court would not enlarge the time.

1. Bull. 122.
Tidd's Pract.
248.

The King against The Hamlet of Spitalfields.

Case 230.

THE CASE, upon an order of removal, was thus: The husband worked at a silk-throwster's in the hamlet of *Spitalfields* for five years, but never lay where he worked, but at a lodging elsewhere. The justices of peace being of opinion, that the husband had gained a settlement by this means, did, after his death, by an order, remove his widow thither, which order was confirmed upon an appeal.

The settlement is where the party dwells, and not where he works.

S. C. 2. Bott, 457.
S. C. Fort. 307.
Post. 370.

But both the orders were quashed, because THE COURT was of opinion that the husband's working there gained no settlement; and so it was resolved in *the Cabler's Case* (a) who worked in a stall in the parish of *St. Giles's*, and had an apprentice who worked with him in that stall, and both lay in another parish; it was adjudged that the working in the stall did not gain a settlement, for that was in the parish where he lay, and that a man cannot be removed from his work, consequently his working in a certain place shall not gain any settlement there (b).

* [109]

(a) Stra. 51. Sett. & Rem. 82. (b) See 2d vol. of Mr. Const's edition
Sess. Caf. 115. Foley, 222. 2. Bott, of Bott's Poor Laws, 561.
562. pl. 500.

Case 131.

The King against Austin.

An order of justices for the suppressing of an alehouse, must state the county in which the alehouse is situated; for the county in the margin refers only to the place where the order was made; but it need not aver it to be a common alehouse, or state that the party was summoned.

S. C. Sett. & Rem. 123.
S. C. Fort. 325.

AN ORDER OF SESSIONS was made to hinder the defendant from selling ale; and the exceptions following were taken to this order:

FIRST, That it did not appear by the order that it was a common alehouse: every alehouse may not be a common alehouse.

SECONDLY, It does not appear that the defendant was summoned, or present when this order was made.

THIRDLY, The county is only in the margin, and not in the body of the order; so that it does not appear in what county this alehouse is; which is necessary to the jurisdiction of the justices. Orders of settlement for removal of poor persons are ill, without shewing the place from which they are removed to be within the county (a).

As to THE FIRST EXCEPTION it was answered, that every alehouse is a common alehouse.

As to THE SECOND EXCEPTION, that he was not summoned to appear before the justices: it is true, a summons had been necessary if the statute 5. & 6. Edw. 6. c. 25. had not given the sessions or two justices an absolute power to put down alehouses at their discretion; so that where they have an unlimited power, it is not necessary to set forth any summons in their order; neither is a summons ever set out in orders, but in convictions for deer-stealing or the like, where great fines are imposed, there it is usual to set forth that the party was summoned; but it is not so in orders for bawdery.

As to THE THIRD and most material objection, that the county was not in the body of the order, but only in the margin, it was said, that it was not necessary it should be in the body of the order, because it was no crime to keep an alehouse: it is true, in all criminal cases, either upon indictments, convictions, or orders, if the county be only in the margin, and not in the body of the order, the proceedings ought to be quashed; and so it has been resolved several times, as in the case of *The King v. Sheringham* (b), and *The King v. Marsh* (c); because the county in the margin shews only that the order was made in that county, but not that the alehouse was there, or that the person who kept it lived in that county; so that the justices of the county have no jurisdiction.

PRATT, Chief Justice. There is no difference between an alehouse, and a common alehouse. If an alehouse be suppressed for any disorder (d) or offence committed by the party, he ought to be summoned; otherwise when it is suppressed by the discretionary power of the justices (e). An alehouse may be suppressed as

(a) Sett. & Rem. 115. pl. 151. S. C. Caltr., 299. pl. 181.

(b) Easter Term, 8. Geo. 1.

(c)

(d) 1. Salk. 471.

(e) See *Rex v. Allington*, Stra. 678.

Rex v. Anthony, 2. Burr. 653.

Lord Hale (a) says, if kept in an inconvenient place. * The order does express it to be a disorderly house, and a common bawdy-house.

THE KING.
AUSTIN.

FORTESCUE, *Justice*. It was a question in LORD HOLT's time, whether justices were bound to give a reason why they suppressed an alehouse (b) ? He was of opinion they ought, because the party had a right or interest vested in him by the licence (c). Here a reason is given, it being a *disorderly house*. I do not remember it has ever been held necessary to shew a summons upon these convictions: the distinction has been between *mandamus*'s and convictions by reason of the greatness of the punishment. In an order of bastardy a summons is never shewn (d). And PARKER, *Chief Justice*, said, the objection had been often taken to orders of bastardy, but never prevailed. A conviction of deer-stealing saying "having been summoned," is sufficient (e).

PRATT, *Chief Justice*. *Major sit, an minus, non differt*; be the punishment greater or less, it makes no difference; the party in each case ought to be summoned, and the summons ought to be set out.

RAYMOND, *Justice*. I remember upon a motion of my own, an objection for want of a summons was taken to an order for suppressing an alehouse, but the order was confirmed. The distinction taken by FORTESCUE, *Justice*, seems very reasonable.

* THE COURT demanding of THE SECONDARY how the precedents were in such cases, he answered, that the Court was divided, as to this matter, in a case between *The King v. Glegg* (f), which was in a case of bastardy; * and that the name of the county in the margin has been held good in some orders of removal.

* [310]

THE COURT. The third exception is fatal. In all *criminal prosecutions* it will not be sufficient to put the county in the margin; for that can only prove the order made by the justices of that county, but is no argument that the fact was committed in that county. No difference between indictments and orders (g). This is a criminal prosecution, for it is adjudged a bawdy house, and suppressed as such.

Adjournatur (h).

(a) See *Rex v. Young*, 1. Burr. 556.

(b) *Williams*, 3. Burr. 1317.

(c) 1. Salk. 471.

(d) *The Queen v. King*.

(e) *Rex v. Simpson*, 1. Stra. 44.

(f) *Ante*, 3.

(g) *Rex v. Marshall*, Trinity Term in B. R. 10. Geo. 1.

(h) It is said S. C. Fort. 325. that on consultation and precedents the order was quashed on the third exception, 2. L. Ray. 1406.

Case 232.

Graves against King.

Where the judgment shall be as of the first day of the Term.

Stm. 357.
4. Com. Dig.
"Execution"
(D. 2.).

THE PLAINTIFF had judgment in *Hilary Term* 1722, which was now three years ago, which judgment was signed the fourteenth day of *February*, two days after that Term, and the execution bore *teste* the twelfth day of *February* 1723; and no *scire facias* first sued out to revive the judgment.

RABY urged this to be irregular, for the judgment relates to the first day of the Term, so that there is above a year between the judgment and the execution. The day of signing the judgment, which is required by 29. *Car.* 2. c. 3. has no other relation than as it affects purchasers, in respect to the plaintiff and the defendant; and as to all other purposes, it is a judgment of the first day of *Hilary Term* 1722, by fiction of law; so that the *teste* of the execution ought to be the first day of that Term, otherwise it is wrong; and therefore it was moved to quash this execution.

FAZACKERLY *contra* said, that the plaintiff was right in point of fact, though he was wrong by a fiction in law.

Therefore IT WAS MOVED, that the plaintiff might have leave to enter continuances to the last day of this Term, so as to make it a judgment of that day; or that he might have leave to get the judgment signed as of the succeeding Term, as a fine taken in Vacation may be entered either of the preceding or succeeding Term.

BUT THE COURT denied leave to enter continuances, this being now a record of three years standing, neither would they give leave to enter the judgment as of the succeeding Term; it is true, it has been done in fines, but these are by the agreement of the parties, but judgments are obtained upon adversary suits; therefore the judgment in the principal case must be of the first day of *Hilary Term*.

THE COURT was divided as to quashing this execution.

PRATT, *Chief Justice*, and POWYS, *Justice*, were of opinion that the Court ought not to interpose to set aside the execution.

FORTESCUE and RAYMOND, *Justices*, held the execution void. It is not by a fiction of law, it is the law itself, that all judgments, though signed the last day of the long Vacation, are judgments of the first day of the Term preceding: it cannot be a judgment of the fourteenth of *February*, for the Court gives no judgment in Vacation. A fine taken in Vacation may be entered either of the Term precedent or subsequent, it being the agreement of the parties.

THE COURT being divided, no rule could be made; wherefore let the execution stand.

* Skipworth against Green.

Case 233.

IN AN ACTION OF COVENANT for non-payment of rent reserved on a lease for years made by the plaintiff, as guardian to *Lord Craven*, wherein he demised meadow, pasture, and arable land to the defendant, and amongst the rest "all those two closes called or "known by the name of *Lane's meadow*," and the defendant covenanted to pay the rent, and also five pounds an acre for every acre of meadow or pasture ground which he should break up or plough; and the breach assigned was, that the defendant had ploughed up *duo prata vocat. Lane's meadow*, by reason whereof he is to pay five hundred and sixty pounds, and for non-payment thereof this action was brought.

In covenant on a lease demising meadow, pasture, and arable lands, and describing two closes by the name of "*Lane's meadows*," in which the lessee covenants to pay 5l. for every acre of meadow he shall plough; if the breach be assigned in ploughing up two meadows called "*Lane's meadows*," the defendant may plead that the lands called "*Lane's meadows*" were time out of mind arable, and traverse them being meadow; for the words "*Lane's meadow*" in the lease being descriptive of the local situation, and not of the nature of the land, they do not stop from trying the fact.

S. C. 3. Danv. 272.
S. C. 1. Stra. 610.

* [312]

The defendant justifies, for that the lands called *Lane's meadow* were, time out of mind, arable lands; *ABSQUE HOC*, that they were meadow lands.

REEVE for plaintiff, upon a demurrer to this plea, insisted that it was ill, because the defendant, who is a party to the indenture, shall not be admitted to say that *Lane's meadows* are arables, because it is contrary to the indenture itself, by which he is estopped to say that those lands are not meadow; and this appearing on record, the plaintiff need not plead and rely upon it, but shall take advantage of it by demurrer; and the defendant having joined in demurrer, the plaintiff must have judgment.

HAWKINS, Serjeant, answered, that the plaintiff demised meadow, pasture, and arable lands to the defendant; now if the lands called *Lane's meadows* are not arable, then that word must be rejected, for without those meadows there is no arable land at all. As to the *estoppel* it cannot be, because the lessee cannot be estopped by the words of the lessor, for the calling the lands by the name of *Lane's meadows*, are the words of the lessor, by which he describes the lands as meadow. It is true, any of the parties to an indenture are estopped to contradict or deny essential words of the deed; but in this case they are only descriptive words of a meadow which is not really so, therefore this is not contrary to any of the essential words of the deed, especially since the names of lands are taken from reputation in old deeds to preserve the evidence of such lands, which otherwise might be lost, and is seldom regarded by any lawyer in drawing conveyances, for the names of the parcels are entirely left to the clerk. * *Estoppels* are odious in law, and admitted merely out of necessity (a), because they are concluding to speak the truth; as for instance, a stranger joined with the owner of the land in making a lease; now though in reality this was the lease of the owner, yet it is likewise the lease of the stranger by conclusion, otherwise his signing it would be to no purpose, so that it is an *estoppel* by necessity. Besides, covenants and agreements are

(a) Co. Lit. 45. a.

Ex parte
Gifford.

to be taken according to the intention of the parties; and when the defendant covenanted to pay five pounds for every acre of meadow he ploughed up, it must be intended for every acre which was really meadow, and not for closes called *meadows*.

If a lease be made by A. as guardian to B. the lessee is estopped to say, that being only tenant at will, he had no power to make the lease.

1. Term Rep. 701.

SECONDLY, It was objected against the declaration, which is, that the plaintiff, as guardian to the *Lord Craven*, made this lease; now, every guardian (except a guardian in socage, which the plaintiff does not appear to be) is but tenant at will (a), and by consequence cannot make a lease for any certain time, or number of years, and if so, then this lease for years is void; and so are all the covenants depending thereon; and therefore the plaintiff has no right to this action; and all this matter being on the same record, the defendant is not estopped to shew it (b).

TO THIS IT WAS REPLIED for the plaintiff, that there are five hundred acres of land demised, and certainly some of them must be arable; but the two closes are specially to be meadow by an *ac etiam demisit duo prata VOCAT. Lane's meadow*: and as to the objection, that those are the words of the lessor, and therefore shall not conclude the lessee, it is not so in an indenture, for there the words "grant and demise" are the proper words of the lessor: and yet the defendant is estopped from pleading "*non demisit*" though it is otherwise in a deed-poll, for there the lessee may plead, that the lessor *nil habuit in tenementis, &c.*

As to the objection to the declaration, viz. that the plaintiff appears on record to be guardian, who is but a tenant at will, and cannot make a lease; this is contrary to the indenture; and the setting him forth to be a guardian, is only a description of the person, but does not prove that he who made the lease is such; he may have a greater interest than barely as guardian; therefore the lessee who enjoys this land by virtue of and under this lease, is estopped to say, that the lessor had no right to make it; and the rent ought to be paid as long as the defendant enjoys the land.

PRATT, Chief Justice. The lessor demands five pounds an acre for every acre of meadow ploughed by the defendant; and to entitle himself thereunto, lays the ploughing the lands called "*Lane's meadows*;" the defendant pleads, that the lands called "*Lane's meadows*" are not meadow, but arable lands time out of mind; the plaintiff demurred, for that it is called meadow in the indenture of lease, and the defendant joined in demurrer. Now it must be considered, that deeds must be construed according to the intention of the parties, and that the name of "*meadow*" in this deed is only a description of the land by reputation, and no direct averment that it is meadow; therefore to plead that they are not meadow, is not contrary to the intent of the parties. It is true it is said that the plaintiff demised *aut prata VOCAT. Lane's meadow*; now though they were not really meadow, yet by this de-

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(a) Co. Lit. 57.

(b) Co. Lit. 372. 1. Lev. 45.

scription they would pass in this deed, and therefore it would be too strict, and plainly against the intent of the parties, to construe this to work an estoppel. Now the reservation of the rent of five pounds an acre for every acre ploughed by the defendant, must be intended for every acre which is really meadow, and not for acres called "meadow," for the name is but the description of the land, and often differs from the nature of it; for if the nature of the lands should be taken from the name, then all those great improvements of the marsh-lands in *Lincolnshire*, which are still called "marsh" in deeds, would likewise still be marsh. It has been truly said at the bar, that *estoppels* are odious in the law; and it would be very hard that the defendant should be bound by this description; and though all the parties to an indenture are bound by the words thereof in point of law, because they agree to it; yet that must be intended of material words, and not to every minute and descriptive words and circumstances. Now if these two closes had been demised as containing five hundred acres, and so mentioned in the indenture, certainly the defendant would not have been estopped to say there were not so many acres.

Scire facias
against
Green.

THE COURT was clearly of opinion, that the plea was good.

Sed adjournatur (a).

(a) It is said S. C. 1. Stra. 610. that the whole Court was of opinion, that the defendant had a right to try the fact, whether it was ancient meadow or not, and therefore that the plea was good, and that the defendant must have judgment. And S. C. 3. Dapv. Abr. 272. says it was so adjudged.

Welder against Buckler.

Case 234.

SCIRE FACIAS against the pledges in a plaint in *replevin*. The plaint was removed into the court of common pleas, where the plaintiff declared, &c. and the defendant avowed the taking, &c. as a distress for rent, and had judgment to have a *return irrepleviable*.

In what manner the judgment must be set out in a *scire facias* against pledges in *replevin*.

A WRIT OF ERROR was brought in the court of king's bench, and the judgment was affirmed, and then a precept was directed to the sheriff to make a return of the goods to the defendant. The sheriff returned an *elongata*.

S. C. 1. Stra. 611.

The defendant thereupon brought a *scire facias* against the pledges (a), in which he set forth, that he had recovered judgment in the court of common pleas, "*prout patet de recordo, &c. in communibus banco*, which judgment was affirmed in error in the court of king's bench, *prout patet, &c.*" The defendant pleads that the record remains in the court of common pleas.

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On demurrer special,

(a) 5. Com Dig. "Pleader" (3. K. 5.).

WELDON
against
BUCHANAN.

REEVE for the plaintiff argued, that a writ of error upon a judgment in the court of common pleas, removes the record itself, and not only the transcript; for execution is awarded by this Court if the judgment is affirmed. A writ of error returnable in the exchequer-chamber is different; for there the transcript only is removed.

BRAINTHWAITE, Serjeant, then excepted to the *scire facias* for inconsistency: it shews that judgment was recovered in the court of common pleas *prout per record. remanen. in C. B. plenius apparet*; that error was brought in the court of king's bench where judgment was affirmed, *ut per record. remanen. in B. R. plenius apparet*.

THE COURT. *Scire facias*'s have been often amended: However, let the plaintiff discontinue on payment of costs.

Case 235.

Theed against Starkey.

A covenant to pay taxes on the land does not extend to the rates to church and poor.

COVENANT against an executor for not paying taxes according to a covenant in a lease made by his testator, wherein he covenanted with the lessee to pay all the taxes on the lands demised; and the breach assigned was, for not paying the rates to the church and poor.

3. Bulst. 354.
Cowp. 453
Doug. 411. 427.

Upon demurrer to the declaration IT WAS OBJECTED, that the breach was not well assigned, because those rates are personal charges (a), and not on the land.

And for this reason the defendant had judgment.

(a) 5. Co. 67.

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Case 236.

Wyvell against Stapleton.

If a judgment for the defendant in the common pleas be reversed on a writ of error in the king's bench, the plaintiff is not intitled to the costs of the writ of error, but to those only which he would have had on a judgment in his favour in the common pleas.—S. C. 1. Stra. 615. 6. Mod. 88. 1. Ld. Ray. 992. 1. Bac. Abr. Costs (G.). 2. Eurr. 1097. Hullock on Costs, 294. Tidd on Costs, 39.

UPON AN ACTION brought in the court of common pleas on a *South-Sea* contract, the defendant had judgment; and upon a writ of error brought in the court of king's bench, that judgment was reversed, and judgment that the plaintiff in error should recover his debt and costs, as he should below.

* WELDON moved, that the plaintiff in the original action might recover his costs thereof; for this Court is not only to reverse the first judgment, but ought to give the same judgment as the court of common pleas should have given; in which case costs would have been recovered. By the statute of *Gloucester*, c. 11 the plaintiff is to recover "the costs of his writ purchased," which is expounded to intend to all the legal costs of the suit (a). We

(a) 2. Inst. 288.

do not pray costs of the writ of error, but costs for the delay occasioned by the writ of error. In the case of *Mulcary v. Eire (a)*, judgment in *Ireland* was reversed, and no judgment given for the damages and costs. There is no case in point.

WYLLIE
against
STAPLETON.

REEVE *contra*. No costs were recoverable at the common law upon a writ of error. The statute of 3. Hen. 7. c. 10. is the first statute that gives costs on a writ of error; but neither that statute nor the 8. & 9. Will. 3. c. 11. extend to writs of error where judgment is reversed; only when judgment is affirmed, or the writ of error discontinued. There is no precedent for costs upon the reversal of a judgment.

THE COURT. In the case of *Mulcary v. Eire* no costs were given but on the original judgment. If any costs are recoverable in this case, it must be on the statute of *Gloucester*; no other statute has given costs. We are to give the same judgment as the common pleas ought to have given; and how could they adjudge costs for the writ of error? HOLT, *Chief Justice*, called a writ of error a revivor of the cause and removal thereof.

Adjournatur (b).

(a) Cro. Car. 511. See also 2. Saund. 257. 1. Ld. Ray. 427.

(b) It is said S. C. 1. Stra. 617. that the Court ordered the master to tax the

plaintiff such costs as he would have been intitled to in the court of common pleas, but refused to allow him costs upon the writ of error in the king's bench.

Wilson against Aldridge.

Case 237.

THE PLAINTIFF obtained a judgment at law, and afterwards, by a *feri facias* directed to the sheriff, he levied the debt on the goods of the defendant, who exhibited a *bill in equity* against the now plaintiff, suggesting that there was more due to him from the plaintiff than he recovered; and so got an injunction to stay the money in the sheriff's hands. Sheriff ordered to return his writ.

The plaintiff and his attorney, being prisoners in THE FLEET, moved the Court against the sheriff, to return the writ of *feri facias*, and that he might be amerced till he do.

And now the Court was moved in behalf of the sheriff for direction what to do; for if he returned his writ he must pay the money, and then the court of chancery would commit him for not obeying the injunction; and if he did obey it, then the court of king's bench would amerce him.

* THE COURT would not take any notice of the proceedings in chancery, but ordered the sheriff to return his writ, otherwise they would commit him.

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Then the Court being desired to help the sheriff to discover what attorney or solicitor carried on the prosecution against him, they refused so to do, because that would be only to enable the sheriff to move the court of chancery for an *attachment*; so he had no relief.

Townsend

Case 238. Townsend against The Assignee, and several Commissioners of Bankruptcy.

Barrister at law being joined with another, hath no privilege to change the venue.

A MOTION was made to change the venue from *Worcestershire* to *London* or *Middlesex*, for that there would be a very great inconvenience to carry down all the proceedings of the commissioners; besides, one of them is A BARRISTER AT LAW; and two others are *attornies*; and it is the constant rule of this Court to allow them to change the venue in all transitory actions, either to *London* or *Middlesex*; and the rather in this case, because all the assignees and commissioners are made defendants; and the only evidence which can be against them, is what they have done as commissioners here.

THE COUNSEL for the plaintiff allowed the commission to be good, and the proceedings under it; but that the fact on which this action was founded, was done in *Worcestershire*, which was the taking the plaintiff's goods; and the privilege of A COUNSELLOR or *attorney* was never carried farther than when they were concerned in the action in their own right; for where another is joined with them, that privilege is never allowed; besides, the bankrupt himself lived in *Worcestershire*.

THE COURT would not change the venue, because the plaintiff obliged himself to give evidence only of such matters as happened in *Worcestershire*; and when another is joined in a suit with A COUNSELLOR AT LAW, or that it is *in auter droit*, he has no such privilege as to change a venue.

Case 239.

Cowper and Miles against Ginger.

On a writ of error being quashed, because not brought by all the parties to the judgment, the defendant shall have costs.

A WRIT OF ERROR was brought by *Miles* upon a judgment given in the court of common pleas against *Cowper* and *Miles*, which writ of error was quashed because *Cowper* did not join in it. *Ginger*, the defendant in error, thereupon moved for costs, as if the judgment had been affirmed (a). But * *Miles* and *Cowper* brought another writ of error (b) *de recordo quod coram vobis residet*.

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And IT WAS OBJECTED, that the defendant in error is not intitled to costs, unless that writ is likewise quashed.

(a) See 4. Ann. c. 16. s. 25. "that upon quashing any writ of error for variance from the original record or other defect, the defendants or such error shall recover, against the plaintiff or plaintiff's issuing out such writ, his costs, as he should have had if the judgment had been affirmed, and to be recovered in the same manner." See also 3. & 9. Will. 3. c. 11. s. 2.

(b) It lies on a judgment in the king's bench for any error in the record, as want of an original, &c. or concerning matters of fact, as nonage, death of the party; for error in fact is not the fault of the Court; therefore it may be determined by the Judges when the record is before them.—Not so to the former edition.

But

BUT IT WAS ARGUED, that a writ of error *coram vobis* would not lie in this case, because the record was not removed by the first writ of error; for the difference is, where the first writ of error abates or is discontinued, there the record is removed, and error *coram vobis* will lie; but where there is a variance in the stile of the court, or the parties are not sufficiently described, there the writ of error must be quashed; and in such case the record is not removed, because it varies from the writ; and consequently the record being not removed, a writ of error *coram vobis* will not lie. Now in this case the record is fully described in the writ, and there is no manner of variance between the one and the other; and the case is no more than if an action should be brought by one, where it ought to be brought by two, there the action must abate; and the quashing the first writ of error was in nature of an abatement, because the record being sufficiently described in the writ, it abated or was quashed, because it was brought by one, when it should be brought by two; therefore the writ of error being naught, the record was not removed; and if so, error *coram vobis* does not lie; neither is there anything inconsistent in the record but "*ad damnum ipsius*," when it should be "*ad damnum ipsorum*." Now the first writ of error was quashed for matter appearing on the record itself, and it was never a good writ; and if so the record was never removed, for the first writ ought to be brought by both, because both entered into the recognizance; but it being brought by one alone, he has no right to examine the errors alone; therefore he ought to have joined the other in the writ, and if he had been unwilling to proceed, he should be *summoned* and *severed* (a).

PRATT, Chief Justice, said, that, if a stranger should bring a writ of error in this court of a judgment in the common pleas, the record is not thereby removed, which he compared to the present case, where the writ of error was brought by one when two ought to join.

And THEY WERE ALL OF OPINION, that the defendant in error should have costs, though that writ was quashed, as if the judgment had been affirmed.

As to the writ of error *coram vobis*, they ordered to search precedents.

Afterwards THREE OF THE JUDGES were of opinion, that error *coram vobis* did lie; and they grounded their opinion upon the case of *Walker v. Stokoe* (b), which was thus: Judgment in trespass against five defendants, and a writ of error being intended to be brought, the attorney left a note with THE CURSITOR to make it out between the plaintiff in error, and five more, naming them:

If judgment be given against 100 persons, and a writ of error, in which the record is rightly described, be brought by one of them only, yet the record is thereby removed although the writ is quashed.

S. C. ante, 16. 81. 305.
S. C. post. 381.
S. C. 1. Stra. 606.
1. Stra. 262.
2. Ld. Ray. 151.
1. Wils. 88.
Burr. 1792.
2. Term Rep. 738.
5. Com. Dig. "Pleader"
(3. B. 13.)

If a record is removed by a writ of error, and the writ is abated or quashed, the party may bring error *coram vobis* *residuo*.

1. Roll. Abr. 753. Yelv. 6. 2. Ld. Ray. 1403. 5. Com. Dig. "Pleader" (3. B. 13.)

(a) 3. Mod. 134. 1. Ld. Ray. 71. (b) 5. Mod. 16. 69. Carth. 367. 370. 1403.

"NOTE,

COWPER
AND MILES
against
GINGER.

“NOTE, *that one of the defendants is dead*.” and THE CURSITOR made the writ against four, without mentioning him who was dead; the question was, whether this was amendable? and adjudged that it was not, because all the parties to the judgment ought to join in a writ of error: it is true, this was a plain mistake of THE CURSITOR, whose instructions were right; but yet it shall not be amended, because this writ of error was brought to reverse a judgment; but the statutes for amendment of writs were made for the support of judgments, so that writ of error was quashed.

And THE COURT now said, that after that writ was quashed, the plaintiff in error brought a writ of error *coram vobis residen*, wherein the first writ of error was misrecited, it being of a plea *in curia nostrâ*, whereas the suit was in the reign of the King and Queen, and the writ of error was in the king's time only; for the record was misrecited, and for that misrecital the writ of error *coram vobis* was quashed (a).

(a) See the case of Ratcliffe v. Burton, Trinity Term, 8. Geo. 2. Cases Temp Hardres, 135. in point.

Case 240.

Andrews against Paradise.

If a man covenant that he will not interrupt the covenantee in the enjoyment of a close; the erection of a gate which intercepts it, is a breach of the covenant, although he had a right to erect it.

Cro. Jac. 233.

* [319]

ERROR OF A JUDGMENT in the common pleas in an action of covenant, in an indenture to lead the uses of a fine, wherein the cognisor covenanted that the cognisee should quietly enjoy, &c. and that he would not do any thing to molest, hinder, or prevent him (the cognisee) or his wife, or any occupiers of theirs, in the quiet possession or enjoyment of the lands, &c. but that the defendant had molested him, &c.

The defendant pleaded, that he had done nothing to molest; hinder, or prevent the cognisee or his wife, &c.

* The plaintiff replied, and assigned a breach, for that he was seised of a close in such a field, being parcel of the lands now purchased under his fine and conveyance, and that there was a lane leading to this close, through which lane the plaintiff had a way to the close, and that the defendant, *scilicet* POSTER, did erect a gate across that way, *per quod* the plaintiff's tenant was obstructed in the quiet possession and enjoyment of the aforesaid close, &c.

And upon a demurrer to this replication the plaintiff had judgment in the common pleas.

And now upon this writ of error brought, IT WAS INSISTED; that the judgment should be reversed.

FIRST, For that the replication was only argumentative of an obstruction, *viz. per quod* the plaintiff's tenant was obstructed; whereas the pleading ought to have been certain.

SECONDLY, Nothing appears in this replication to shew that the setting up the gate was unlawful, for there may be another way, which might make it necessary and lawful to set up a gate.

THIRDLY,

Michaelmas Term, 11. Geo. 1. In B. R.

THIRDLY, That it is not set forth where, or to what place this way leads, so that the defendant cannot make any answer to it, the replication being too general.

ANDREWS
against
PARADISE.

FOURTHLY, This is not an obstruction of enjoying the close immediately, but by consequence; and the plaintiff has not shewed that he had a right to enjoy this way.

S. Rep. 89.
2. Vent. 58.

IT WAS ARGUED *for the affirmance of this judgment*, that the lane was left for the use of this close upon the inclosure of a common field, and that it is convenient for the purchaser, and very necessary for preserving the possession; and that this lane was constantly used by the occupiers of the close before this conveyance and covenant were made, which is not a covenant as to the right, but to secure the plaintiff in the quiet possession; and the breach being well laid, *viz.* that the defendant obstructed the quiet enjoyment by setting up a gate across the lane, the judgment ought to be affirmed.

THE COURT. This appearing to be a necessary way for the enjoyment of this close, then, whether the gate is set up by right or wrong, it is not material as to the defendant; for in either case, if it be an obstruction, it ought not to be erected there.

The judgment was affirmed.

The King *against* Thead.

Case 241.

BY the statute 8. Ann. c. 9. s. 1. 10. for laying certain duties on candles it is enacted, "That all and every the officers for the said duties shall at all times by day or by night, and if in the night then in the presence of a constable or other lawful officer of the peace, be permitted, upon his or their request, to enter the house, melting-house, warehouse, or other place whatsoever belonging to or used by any person or persons who shall be a maker or makers of any candles whatsoever, and by weighing or tale of the candles, or otherwise, as to such officer shall seem most proper and convenient, to take an account of the just quantity of candles which shall have been made by each maker or makers of candles, from time to time, &c."

If a penal statute authorize an officer to enter a house by day or by night, but if by night in the presence of a constable; it is sufficient, in a conviction for obstructing the officer, to say he entered *lawfully*; but if it was by night, the defendant may shew before the magistrate that the entry was without a constable.

And by 8. Ann. c. 9. s. 11. "All and every such maker and makers of candles respectively are required to keep sufficient and just scales and weights, at the place or places where he, she, or they do make such candles, and permit and assist the officer to make use thereof for the purposes of this act, under the penalty of ten pounds, to be forfeited and lost for not keeping such scales and weights, or for not permitting and assisting the officer to use the same as aforesaid."

* [320]

S. C. 2. Bar.
K. B. 16. 73.
S. C. 2. Ld. Ray.

The defendant was convicted upon this statute, for not assisting the officer of excise in weighing the candles.

1275.
S. C. 1. Seff.
Cases, 417. 331.

S. C. 1. Stra. 608. S. C. Alder. 84. 1. Salk. 13. 5. Com. Dig. "Pleader" (C. 77.).

THE KING
against
THEAD.

IT WAS NOW OBJECTED, that the conviction was wrong, because the statute directs, that if the entry is in the *night-time*, it must be in the presence of THE CONSTABLE; and it is not specified in this conviction, whether the entry was by night or by day.

REEVE *for the Crown*. It is said in the conviction, that the officer entered *lawfully*, which is sufficient, without shewing any circumstances of his entry.

THE COURT. This is a good conviction for ten pounds upon an information before the justices, for they have a jurisdiction in this case, and nothing appears wrong in it; for it being alledged that the officer entered lawfully, it must be intended right, especially when nothing appears to make it wrong: this objection should come on the defendant's part by pleading.

And the conviction was affirmed (*a*).

(*a*) See *Rex v. Thead*, 1. Burr. 152.

Cafe 242.

The King against Edwards and Others.

A conspiracy by parish officers to marry a female pauper settled in the parish of *A*. to a pauper settled in the parish of *B*. in order to bring a charge upon the parish of *B*. is an indictable offence; but the indictment must aver that the parties were *legally settled* in their respective parishes; for saying they were *inhabitants only*, is not sufficient.

THE DEFENDANTS were indicted, for that they, *per conspirationem inter eos habitam*, gave the husband money to marry a poor helpless woman, who was an inhabitant in the parish of *B*. and incapable of marriage, on purpose to gain a settlement for her in the parish of *A*. where the man was settled.

IT WAS MOVED to quash this indictment, because it is no crime to marry a woman and give her a portion; and the justices are not proper judges what woman is capable of a husband, neither have they any jurisdiction in conspiracies.

IT WAS INSISTED *on the other side*, that there is a crime set forth in this indictment, which is a conspiracy to charge a parish, &c. and a conspiracy to do a lawful act, if it be for a bad end, is a good foundation for an indictment. An indictment for a conspiracy to charge a man to be the father of a bastard-child, was held good (*a*), though fornication is a spiritual offence; because the court of king's bench has cognizance of every unlawful act by which damages may ensue. So an information for a conspiracy to impoverish the farmers of the excise, was held good (*b*).

* [321]

S. C. 1. Seff.
Cafes, 336.
S. C. 2. Stra.

* To WHICH it was answered, that those were conspiracies to do unlawful acts; but it was a good act to provide a husband for this woman.

707.

1. Salk. 174.

2. Id. Ray. 1167.

THE COURT. The quashing indictments is a discretionary power of the Court, but in this case the defendant has not shewed anything to induce the Court to quash the indictment; and if the

(*a*) *Temberley v. Child*, 1. Sid. 68.
S. C. 1. Lev. 62. *Rex v. Armstrong*,
1. Vent 304.

(*b*) *Rex v. Starling*, 1. Sid. 174.

matter be doubtful, the defendant must plead or demur; but indictments for conspiracies are never quashed. — A bare conspiracy to do a lawful act to an unlawful end, is a crime, though no act be done in consequence thereof (a); but if the fault in the indictment be plain and apparent, it is quashed for that reason, and the party shall not be put to the trouble to plead or demur. Suppose there is a conspiracy to let lands of ten pounds a year value to a poor man, in order to get him a settlement, or to make a certificate man a parish-officer, or a conspiracy to send a woman big of a bastard-child into another parish to be delivered there, and so to charge that parish with the child; certainly these are crimes *indictable* (b). But in this indictment it is not set forth, that the woman was likely to be chargeable to the parish. As to the objection, that the sessions have no jurisdiction in *conspiracy*, the contrary is true; they have no jurisdiction in *perjury* at *common law*, but by *the statute* they have; and they have no jurisdiction to indict for forgery, but certainly they have jurisdiction *de conspirationibus* (c), and such a person as this defendant is, was punished by indictment at common law (d).

THE KING
against
EDWARDS

Finch. So. cap
15.

But in the *Trinity Term* following judgment was given for the defendant, because it was not averred in the indictment, that the woman was last legally settled in the parish of *B.* but only that she was an inhabitant there.

(a) Reg. v. Pest, 2. Ld. Ray. 1167. S. C. 6. Mod. 185.

(b) It is also said, that the Court will grant *an information* against *overseers* for this offence, Rex v. Sadler, Sayer, 260. Rex v. Tarrant, 4. Burr. 2106. But the Court has come to a resolution not to grant informations in these cases, Easter Term 25. Geo. 3. and therefore it was refused against the overseers and inhabitants of *Dorchester*, for conspiring to prevail on a soldier to marry a poor woman of their parish then big with child, for the purpose of throwing the burthen of maintaining her on another parish; Rex v. Compton, Cald. 246. It has also been refused in a very gross case, that of a man

under decess married to an idiot, Rex v. Uptdale, Mich. 28. Geo. 3. Cald. 247. *nois*. But if persons concurring in such a conspiracy are of good circumstances, and in responsible situations, the Court will grant *an information*, otherwise the injured parties must resort to the ordinary method of *indictment*, Cald. 247.

(c) Rex v. Russell, 2. Burr. 1320.

(d) It is said, S. C. 1. Sess Cases, 336. that the Court left the defendant to demur or plead to it, as they should think fit; and S. C. 1. Bria. 707. that on a *demur* to this indictment, judgment was given for the defendant, because it is not an offence indictable.

Sir John Walrond against Jacob Senior Henricus Van Case 243.
Moses.

A MOTION was made for leave to change the bail in this cause, on the very day that it was to be tried by *nisi prius*, because one of them was a very material witness for the defendant.

THE COUNSEL for the plaintiff objected against it, viz. that the bail should not be changed, because the principal was run away, and the bail had offered a hundred pounds reward to any person who should bring him in; besides, the new bail now offered

One of the bail was a material witness for the defendant, and therefore he moved that new bail might be put in, but it was denied.

SIR JOHN
WALTON
againt
JACOB SENIOR
HENRICUS
VAN MOSES.

instead of the former, were bail to an *action upon a *South-Sea* contract, in which the plaintiff had a verdict for thirteen thousand four hundred pounds, so the plaintiff in this action cannot tell what they may be worth after the payment of that sum.

THE COURT. If the bail surrender the principal, they shall be admitted to put in new bail, and then the old bail may give evidence at the trial; but the bail now offered being bail in another action for a considerable sum, and a verdict against the principal, the plaintiff in this action cannot have timely notice to inquire into their circumstances; therefore the Court will not force new bail to the action, but the old ones must stand.

* * * * *

Trover will lie here for a conversion in *Ireland*.

NOTA, At the trial of this cause, a case was cited, That *trover* lay in *England* for timber taken away and converted in *Ireland*; and this was by the opinion of the late *Chief Justice* HOLT, though it was objected, that it might bring the title of lands in *Ireland* in question, which could not be tried here; but he answered, that as *trover* is a transitory action, it might be brought here for a conversion in *Ireland*; nor shall any incident question which may arise on the same bar the plaintiff of such action, for if it should, then a person being in *England* can have no remedy here when the defendant is guilty of a *trover* in *Ireland*, and comes from thence into this kingdom.

See Doulsen v. Mathews, 4. Term Rep. 503.

All which was now offered in answer to a question made, whether an action lay here on a contract made in *Holland*; and the case of *Brown v. Hodges* (a) was cited, which was, *Trover* brought here, and upon *not guilty* pleaded, it appeared, that the defendant was tenant by the curtesy in *Ireland*, and had cut down trees there, and that the reversion belonged to the plaintiff; and upon a case made for the opinion of the Court, it was resolved, that in all local actions, as in trespass *quare clausum fregit*, the plaintiff cannot prove a trespass anywhere else, but where it is laid in the declaration, nor lay it in any other place but where it was done; but that it was otherwise in transitory actions, as *trover*, &c. therefore the plaintiff might lay the conversion here, and prove it was done in *Ireland*.

* * * * *

Copy of an agreement in *Holland*, if attested by a NOTARY, is good evidence in *England*.

NOTA ALSO, That in the principal case it was now resolved, that a copy of an agreement registered in *Holland*, and attested by a public notary there, may be given in evidence for the now defendant, especially since he proved that the plaintiff took out another copy of the same agreement, and would not now produce it; therefore that copy which the defendant had taken out was given in evidence, for it is plain that * the plaintiff knew the agreement, he having taken a copy thereof, so could not be surprized.

NOTA ALSO, That at the same time the Court held, that a plaintiff who was in *Holland* might make affidavit there, and get it attested by a public notary; and that it should be admitted as evidence to hold the defendant to special bail here.

SIR JOHN
WALKER
against
JACOB SENIOR
HENRICUS
VAN MOSES.

Warren against Confett.

Case 244.

THIS was a writ of error on a judgment in the common pleas, in an action of debt for a penalty in not performing an agreement, to receive and pay so much for a transfer of stock, &c.,

"*Nil debet*" is
no good plea to
an action of
debt on a pe-
nalty.

The defendant pleaded *nil debet*; to which plea the plaintiff demurred and had judgment, for that *nil debet* was no good plea; and that being now the only question,

S. C. ante, 106.
S. C. post. 382.

S. C. 2. Stra.
778.

S. C. 2. Ld. Ray.
1500.

S. C. Prac, Reg.
300.

S. C. 1. Bar. 15.

It was argued by REEVE for the plaintiff in error, that the plea was good. It is true; it is not so in an action of debt on a bond, because the debt is immediately due; but it is otherwise in an action for a penalty, because the plaintiff could not demand it as a debt or duty; for it is not so without laying some fact antecedent to his demand, to entitle himself to this action; and that must be something *dehors* the deed to support the demand; for there is a difference between a bond for performance of articles, where the condition appears in the very body of the bond, and an obligation which has a defence or condition in it not in the body of the obligation; for in this last case a man may have an action on the obligation, without setting forth any matter *dehors* to entitle him thereunto; and in such case *nil debet* is no good plea, for the obligation must be avoided by matter of as high a nature, and the defendant is *estopped* by the deed to say nothing is due; but it is otherwise in the first case, for there the debt is not due *prima facie* on the deed, but for not doing some other collateral act.

The cases following were cited to shew this to be the constant difference, *viz.* that wherever the debt arises by matter collateral to the lien, it is a good plea; because there arises no estoppel by the deed. When matter of fact and record are mixed, the party is not bound to plead *nul tiel record*, in an action of debt against a sheriff or gaoler, for an escape of one in execution (a); though the plaintiff must declare on the judgment, *nil debet* is a good plea, and so it is to an action of debt on the statute 2. Edw. 6. for not setting out tithes (b); and so it is to an action of debt on a judgment against an executor upon suggesting a *devastavit* (c), because the *devastavit* is a matter *en pais* triable: so said by HOLT, Chief Justice, in the case of *Bargett v. Andrews* (d).

11. H. 7. 4. b.

21. H. 7. 14.

45. Edw. 3. 4. b.

46. Edw. 3. 1. b.

Broke, Issue
joined, 23.

5 Com. Dig.

"Pleader"

(2. W. 16.)

* [324]

Hut. 109.

Hob. 224.

Lev. 170.

2. Keb. Rep.

347.

IT WAS AGREED on the other side, that *nil debet* is a good plea where the action is founded on a collateral matter, and not comprised in the deed; and these are cases of daily experience; as in

(a) 1. Saund. 38.

(b) Cro. Car. 513.

(c) Hutten, 109.

(d)

WARREN
against
CONSETT.

2. Sand. 344.
Hard 332.
Salk. 565. pl.
Keilw. 47.

actions of debt for rent reserved on a lease by deed ; and in actions of escape, and in all acts founded on acts of parliament. But the action in the principal case is entirely depending on the deed, and absolutely founded on the obligation therein, by which the defendant bound himself in such a penalty, which is an obligation to all intents and purposes ; but where the lien arises on the deed itself, there *nil debet* is no good plea, though matter of fact be averred ; and wherever an action of debt is brought on an obligation for payment of money, it must be averred that the debt is not paid, which is matter of fact ; and yet in such case *nil debet* is no good plea. But wherever the plaintiff declares on a fact collateral unto, and not arising within the deed, there it is a good plea ; but it is a general rule, that *nil debet* is no good plea to any action founded on a specialty or on a record ; and it would be of very ill consequence if it should, and particularly in this case ; for then the plaintiff must not only prove that this deed was executed, but he must also prove the time of the opening the books, the registering the contract, the tender made by him to transfer, and the refusal of the defendant to accept, &c. and to pay the money ; and after all this hardship, if *nil debet* should be a good plea to a specialty, for so this obligation is, the defendant may surprize the plaintiff by giving a release in evidence, or by proving the obligor was not *compos mentis* at the time of making this obligation ; and such difficulties might make persons defend their causes where there is no colour of defence, but only some hopes that the plaintiff might fail in proving some of those things ; therefore the law will not admit of such complicated issues, but will always have the issue a single point if possible, and for that very reason will never permit a man to plead the general issue to a specialty : besides the vast difference this issue may make of costs at the trial, which probably may be sworn from ten pounds (which might be competent costs upon *non est factum*) to a hundred pounds upon such a complicated issue as *nil debet*, this plea contradicts the deed, and therefore ought not to be allowed more than *nil habuit in tenementis* in an action of * debt for rent reserved upon an indenture ; which was never yet allowed.

* [325]

To WHICH it was answered, that though there be some ingenuity to affirm, that where the facts on which an action is founded are continued, and appear in the deed itself, there *nil debet* is no good plea, yet a bare affirmation without any one authority to support it, will be of no force.

THE COURT took time to give judgment, because the court of common pleas were unanimous in their judgment (a).

(a) See post. 382.

The King against Simpson.

Cafe 245.

Monday, 16 November, 1725.

MANDAMUS to the defendant, who was surrogate to Dr. King, archdeacon of the diocese of London, to swear one Fane church-warden of Colchester, being elected by the inhabitants according to the custom of that parish.

Mandamus to swear a church-warden; the surrogate made an ill return.

The defendant returned, that it did not appear to him *per aliquod scriptum* that Fane was duly elected (a); and that the Bishop of London had inhibited Dr. King, and any person acting under him, to swear this Fane; so he (the surrogate) cannot swear him.

S. C. 2. Ld. Ray. 1379.
S. C. 1. Stra. 609.
1. Ld. Ray. 138.
5. Mod. 325.
1. Bar. K. B. 381.
3. Burr. 1420.

MR. REEVE excepted, that the return did not set forth that Colchester was within the diocese of London.

TO WHICH it was answered, that though the return to the *mandamus* do not precisely mention Colchester to be within the diocese of London, yet when it mentions that the Bishop of London had inhibited the Archdeacon, &c. that is sufficient to shew the Court that it was within his diocese.

A *peremptory mandamus* was granted, as it was in the case of *The King v. Cardigan*; for the Court said, that where the church-wardens are to be elected by the parishioners by prescription, it shall not be in the power of the parson to hinder them.

(a) See *Rex v. Dr. Harris*, 3. Burr. 1421.

The King against White.

Cafe 246.

A MANDAMUS was directed to an archdeacon to swear a church-warden, who was elected by the inhabitants, &c.

He returned *non fuit electus*.

THIS WAS ADJUDGED to be no good return (a).

And a *peremptory mandamus* was granted (b).

"Non fuit electus" no good return to a mandamus to swear a church-warden.

2. Ld. Ray. 1379.
2. Stra. 894.
2. Salk. 434.

(a) But Ld. Raymond says that this determination was certainly wrong, for the return was a good return, and hath often been made to such *mandamus*, and actions brought upon the return and tried. 2. Ld. Raym. 1379, 1380. 1405. 11. Mod. 174. pl. 16. 12. Mod. 3. That

non fuit electus was not a good return, was denied, for the Court said, that case had been over-ruled, and they hoped never to hear it cited again. Fitzgib. 195. 2. Stra. 895. Barnard K. B. 412.—NOT to the former edition.

(b) Burr. 1328.

Anonymous.

Cafe 247.

A MOTION was made by the plaintiff to examine witnesses at a Judge's chamber, they being mariners, and now going to sea on a long voyage.

Seamen who are witnesses, and going a long voyage, cannot

be examined at a Judge's chamber.

ANONYMOUS.

THIS WAS OPPOSED on * *the other side*, because this would be to deprive the party of the benefit of their evidence by cross-examining them at the trial. It is true, such motions have been made where the defendant would put off a trial, or where he desires some other favour of the Court; but here it is in the power of the plaintiff to bring on the trial when he pleases; and the defendant cannot bring it on but by *proviso*, and then this motion might be proper.

THE COURT. This motion would have been granted if the defendant had agreed to it; or if he had desired any favour of the Court, it should not be granted. And admit the plaintiff to examine his witnesses. But that being not this case,

The plaintiff took nothing by this motion.

Case 248.

The King *against* Edwards.

An information lies against overseers of the poor, for removing a sick person.

UPON A MOTION for AN INFORMATION against the overseers of the poor of the parish of *Wadburst*, for removing a poor woman who had the small-pox into another parish, and against her will, from the parish of *Wadburst*, where she was an inhabitant; and the sessions refusing to give any relief;

How. 75.
Com. Dig.
Indictment
(D.).

THE CHIEF JUSTICE said, that where a person is visited with sickness by the act of God, he ought not to be removed from the place where he is sick, farther to endanger his health, without an order of two justices; and if such order be made by the justices, knowing him to be sick, AN INFORMATION shall go against them.

Thereupon a rule was made against the overseers to shew cause, &c.

And on another day they came to shew cause, &c. and denied the fact alleged against them;

And moved, that the rule might be discharged, for otherwise this woman, who was really settled in that parish to which she was removed, would, upon the trial of this information, be evidence against the parish of *Wadburst*, and gain a settlement there.

But THE COURT was of opinion, that the fact being controverted, and carrying such a barbarity with it, it was requisite that it should be tried upon AN INFORMATION; and then the jury would be proper judges of the truth.

Case 249.

* The King *against* Harris.

An indictment for assaulting
" J. S. pett.
" con'bular. in the execution of his office," is good.—4. Co. 41. 5. Co. 121. Cro. Car. 464.
4. Com. Dig. " Indictment" (G. 3).

INDICTMENT for a RIOT, at *Hereford* assizes, and assault-
ing J. S. pett. con'bular. in executione officii.

Michaelmas Term, 11. Geo. 1. In B. R.

IT WAS OBJECTED, upon a motion to quash it, that this indictment was ill, because it was for a riot *in et super pett. con'bularium*, when there is no such word as *pett.*

THE KING
against
HARRIS.

This was granted on the other side, but that *con'bularium*, with a dash, made the indictment good.

THE COURT. The word "*pett.*" is surplusage, and shall therefore be rejected; and the indictment is good without it, for the other word makes it good: for *con'bularium*, by virtue of the dash, may stand for *con'labular'*: such dashes have been often used, and the common use is the only rule in governing our construction of them.

The indictment was held good (a).

(a) N. B. As the law proceedings are now in *English*, this case can never happen again. See Stat. 4. Geo. 2. c. 26. 5. Geo. 2. c. 27. 6. Geo. 2. c. 6.—NOTE to former edition.

Hunston against Howard.

Case 250.

THE PLAINTIFF had judgment in the court of common pleas, which was now above ten years standing, when the defendant brought a writ of error in the court of king's bench, and assigned the want of an original for error; and now the defendant in error pleaded "*in nullo est erratum*;" and the want of an original being not yet certified,

Want of an original assigned for error.

He moved to put it off until the next Term, that he might in the mean time procure an original to be filed, this being a contrivance of his own attorney to defraud him.

THE COURT. This motion should have been made before the cause was put in the paper.

But it having the countenance of fraud, IT WAS RULED to go over upon payment of the costs of the day.

Cuband against Dewsbury.

Case 251.

PROHIBITION. The case was thus: The plaintiff in the prohibition procured A WILL to be delivered to him out of the prerogative court of York; and at the same time entered into a bond in such a penalty, &c. with a condition to re-deliver it again into that court, at or before such a day, &c.; which not being done, THE SPIRITUAL COURT proceeded against him *pro lapsione fidei*, and to have the very WILL brought into court.

If a person procure A WILL to be delivered to him out of the prerogative court, and give a bond to re-deliver it into the court on such a day, THE SPIRITUAL COURT cannot proceed

The defendant pleaded, that he had entered into a bond to re-deliver the will, on which they might have a proper remedy: against him for a breach of his faith, if he do not redeliver it; for they may proceed upon the bond in the temporal courts.—2. Roll. Abr. 283. 2. Inst. 493. F. N. B. 43. 6. Com. Dig. "Prohibition" (G. 13.).

which

CUBAND
against
DEWISBURY.

* which plea being rejected by that court, they proceeded against him there.

And now he moved for a *prohibition*, upon a suggestion that all suits upon or concerning bonds are determinable only at common law.

BOOTLE *contra*. This motion comes too late, there being a sentence and excommunication. The intent of the libel plainly appears to be for a re-delivery of the WILL, and not for the recovery of the penalty of the bond; for the witness to the bond was dead, and probably if it was put in suit they might not recover; besides, the penalty might not be sufficient to make amends for the damages sustained by those who were interested in the lands conveyed by this will, by not having it produced; therefore it is necessary that they should have a power to enforce him to bring it in. Besides, it is the election of the party either to put the bond in suit, or to sue in the spiritual court (*a*); and now some instances were shewed in parallel cases. A man forged AN ORDINATION (*b*), and being prosecuted in the spiritual court, he pleaded, that *forgery* was triable at common law; the Court rejected that plea; and thereupon the plaintiff moved for a prohibition, but it was denied, because the prosecution was in order to a deprivation. So where the suit was in the spiritual court for taking the bells out of the steeple (*c*), the defendant pleaded the general pardon; and that plea being likewise rejected, the plaintiff moved for a prohibition, and that was denied, because the suit being *pro salute animæ* was not pardoned (*d*). And in *Gardner's Case* (*e*), where the executors gave bond for payment of a legacy, DONERIDGE, Justice, was of opinion, that the obligee might sue for the legacy in the spiritual court, or at common law upon the bond; for that the taking the bond had not altered the nature of the legacy.

THE COURT. That case in 2. Roll. Rep. 160. is not law; for the bond satisfies the party by extinguishing the legacy (*f*).

Adjournatur.

(*a*) Cro. Eliz. 607. 844.

(*b*) 1. Lev. 131. 1. Sid. 217.

(*c*) 1. Sid. 281.

(*d*) W. Jones, 230.

(*e*) 2. Roll. Rep. 160.

(*f*) Yelv. 39.

Case 252.

The King against Brereton.

An information for a libel laid in the city of Chester shall be tried in the county of the city by THE MAYOR.

AN information for a libel was laid in the city of *Chester*, which being a local offence, and issue being joined in this court, could not be tried there, but in the county of the city; therefore it was sent by *mittimus* directed to "THE CHAMBERLAIN of the county, palatine of *Chester*," with direction, that he should transmit it to "the mayor of the city of *Chester*," in order to have it tried in the county of the city before him. * The chamberlain accordingly transmitted the record to the mayor, who had the cause tried, and a verdict was given against the defendant; and then the mayor, who

Michaelmas Term, 11. Geo. 1. In B. R.

who was the judge of the court, returned the record, which return was certified by the chamberlain (a).

THE KING
against
BREYNTON.

FAZAKERLY now moved in arrest of judgment.

THE FIRST EXCEPTION was, that it appears by the record that the day is appointed by THE MAYOR; which is therefore void, because done without authority.

SIR PHILIP YORKE, *Attorney-General*, on the other side.

The mayor, being judge, has a right to appoint the day; all the precedents warrant it. Besides, should this objection prevail, we may have a new *mittimus*, or a *venire facias de novo* (b). And this record is well returned, and the day given by the mayor (who was the judge that tried the cause), to hear the judgment of this Court; and if no day had been appointed on the roll, the Court might appoint a day in entering the continuances until a plea or demurrer. 7. Roll. 485.

THE COURT. If the precedents are so we cannot vary now; the city is part of the county-palatine.

THE SECOND EXCEPTION was, that it does not appear that the chamberlain of the county-palatine of *Chester* is chamberlain of the city of *Chester*. A return made by a chamberlain of a city shall be intended made with proper authority.

SIR PHILIP YORKE answered, The chamberlain of the county-palatine is chamberlain of the city of *Chester*, for the city of *Chester* is part of the county-palatine; and he has jurisdiction within the city of *Chester*, by 33. Hen. 8. c. 13. (c). There are but two precedents of actions laid in the county of the city of *Chester*, and in both these precedents the *mandamus* is directed as here (d).

THIS COURT will take judicial notice of the ministerial officers of all counties; * and if THE CHAMBERLAIN has a command over the whole county-palatine, as certainly he has, the Court will intend, that this return was made by him as chamberlain of the county-palatine, and no other shall be intended. * [330] 4. Infl. 212.

THE THIRD EXCEPTION was, that the fact is laid very uncertain, for it is, that the defendant "*scripsit, fecit, et publica- vit, seu scribi fecit, et publicari causavit*," which is very uncertain, and no proper defence can be made, because it is in the disjunctive; therefore where an indictment was "for making, or causing to be made, a bill of lading, it was held ill, because in the disjunctive (a). An information for a libel in the disjunctive, "that he wrote, or caused to be writ en," is bad. 2 Roll Abr. 81. pl. 5.

(a) The writ from THE CHAMBERLAIN to THE MAYOR after issue tried commands THE MAYOR to send the record back to THE CHAMBERLAIN for him to appoint a day for the appearance of the parties, in order for their receiving judgment.—NOTE to the former edition.

(b) 1. Roll. Abr. 285. pl. 4.

(c) Co. Lit. 211.

(d) Trinity Term, 13. Will. 3. Merchant-Taylors Company v. Baynton. Michaelmas Term, 8. Anne, Henshaw v. Tickel.

THE KING
against
BRINGTON.

SIR PHILIP YORKE *answered*, that it is true, a man ought not to be punished where there is any uncertainty in the crime committed; but a disjunctive does not always make a different crime, but sometimes it is explanatory (*b*); and therefore writing a libel, or causing it to be writ, is the same offence; and if so, this information is good; it is like an indictment on the statute 5. Eliz. c. 4. that a man exercised *artem sive mysterium*, and that was held no fault. There is no uncertainty in the fact, for "to write or cause to be written" is the same offence.

THE COURT. "Writing" and "causing to be wrote" are two different acts; there is no information like this. An indictment for erecting *cottagium sive tenementum* is ill. As to the indictment on 5. Eliz. c. 4. it is good, because that is not the charge. If the crimes were the same, yet the indictment ought to be certain.

It is not necessary to set out the whole pamphlet in an information for a libel.

THE FOURTH EXCEPTION was, that the information sets forth, that the defendant made "*quendam libellum in quo continentur hæc scandalosa verba, &c.*" setting forth some words, but not the whole pamphlet, which he should have done, or averred that there were no words in it to qualify those which were uncertain.

SIR PHILIP YORKE. As to setting forth the whole libel, or the contents thereof, it is not material so to do; for if it should, most informations would be set aside for that reason. All precedents warrant this form of setting out the libel; for if there be any other part of the libel which may excuse the defendant, he may take advantage thereof upon the trial.

THE COURT. The information is good, notwithstanding this exception.

Adjournatur.

(a) An indictment for a forcible entry into "two closes of meadow or pasture," is void for uncertainty.—5. Mod. 137. Salk. 342. 371.

(b) Moor, 813.

(c) See Baldwin v. Elphinstone, 2. Black. Rep. 1037.

Case 253.

Sparks against Keeble.

In trespass for taking and destroying hop-poles; a PLEA of *liberum tenementum*, and that they were taken *damage faciant*, without answering the destruction, is bad.—S. C. Fortesc. 378. 4. Co. 62. Cro. Eliz. 268, 474. Cro. Jac. 27. 1. Lev. 16. 2. Leon. 195. 2. Vent. 193. 5. Comb. Dig. "Pleader" (E. 1.)

TRESPASS *quare vi et armis clausum fregit et intravit, &c.* and took away the plaintiff's hops, and destroyed his hop-poles, &c.

The defendant, as to the *force and arms*, pleaded *not guilty*, and justified the entry, for that the place WHERE the trespass was supposed to be done was his (the defendant's) own ground, and that he entered and distrained the poles *damage faciant*.

And

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And upon a demurrer to this plea,

IT WAS INSISTED *for the plaintiff*, that though the defendant might distrain the poles, yet he could not destroy them; and in this plea he made no answer to the destroying them, as he ought.

THE COURT. No justification can be good for destroying a thing distrained, for all distresses ought to be safely kept; so the defendant having not answered that part of the declaration, JUDGMENT must be for the plaintiff.

SPARKS
against
KENNEDY.

* [331]

* Arthur *against* Commissioners of Sewers in Yorkshire. Case 254.

THE PLAINTIFF was chosen clerk to the commissioners of sewers at a meeting, by a majority of forty-three then present; and afterwards, at a second meeting, they made an order to turn him out, and they chose another.

The plaintiff now moved for a *certiorari* to have the order returned.

This was opposed by the commissioners, who offered to read affidavits that the plaintiff was surreptitiously chosen without due notice given to the majority of the commissioners, who formerly made an order, that the commissioners should always give thirty days notice of every meeting; but when this clerk was chosen there were but six days notice given, on purpose to surprize the rest of the commissioners in the choice of the plaintiff, for great part of the commissioners could not possibly be there.

ON THE OTHER SIDE it was said *for the plaintiff*, that the Court would not inquire into the merits of his election until a *certiorari* was granted and returned; for since the commissioners have power by the statute to elect a clerk, and the plaintiff is elected by them, he is entitled to several perquisites by virtue of such election; and the commissioners having thereby executed their power, they shall not be permitted to recall their own act, for if they should, they might chuse a new clerk at every meeting, and turn out the other, and there will be such a contest amongst them as may render the office precarious.

And for this reason THE COURT would not permit the affidavits to be read, but would grant a *certiorari*, which was a writ of right.

But this was denied by ONE OF THE JUDGES, who said, that a *certiorari* was not a writ of right, for if it was it could never be denied to grant it; but it has often been denied by this Court, who, upon consideration of the circumstances of cases, may deny it or grant it at discretion; so that it is not always a writ of right. It is true, where a man is chosen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior jurisdiction, who proceed in a summary way, in such case he is entitled to a *certiorari ex debito justitiæ*, because he has no other remedy, being bound by the judgment of the inferior judicature.

A writ of *certiorari* lies to commissioners of sewers to remove an order made by them for the removal of their clerk; and if the return is qualified, a second *certiorari* shall issue.

S. C. Fortesc.
374.
S. C. Stra. 609.
1. Vent. 67.
1. Lev. 288.
1. Mod. 44.
Bamb. 61.
Stra. 1263.

ARTHUR
against
COMMISSIONERS OF SEWERS
IN
YORKSHIRE.

* The writ of *certiorari* was granted (a).

But the return thereof was quashed for some irregularity; and thereupon the Court was moved for another *certiorari*.

ONE OF THE JUDGES opposed the granting it, because the removal of the orders by virtue of the *certiorari* would not determine the right of the plaintiff, which was the reason of quashing the return of the former *certiorari*.

But by THE OTHER THREE JUDGES the *certiorari* was granted.

(a) It is said, S. C. 1. Strange, 607. that THE COURT held, that a *certiorari* to bring up an order made by commissioners of sewers for the removal of their own

clerk was of *common right*, and not *discretionary*, as in the case of other orders, where great inconveniencies may follow by inundations in the mean time.

Case 255.

The King against Serle.

Mandamus to
swear a mayor,
&c.
Ante, 234.

MANDAMUS to the defendant, late mayor of *Penryn*, in *Cornwall*, to swear *Peter Pindar* mayor, he being duly elected.

6. Com. Dig.
"Quo Warranto"
"to" (C. 5.).

The defendant made this return, *viz.* that this town was incorporated by letters patent made by king *James the Second*, and to consist of a mayor, and so many burgeses; that they were to chuse a mayor every year out of the capital burgeses, who is to act as mayor for a year, and until another was duly chosen; that on *St. Matthew's Day* (being the day appointed by the charter, and in such a year, one *Penhallor* was chosen and sworn mayor, and died within the year; that after his death the corporation proceeded to a new election, according to their power so to do, by virtue of the letters patent, who chose the now plaintiff mayor, who for some time acted under this election; that afterwards an information in nature of a *quo warranto* was brought against him, for usurping this office of mayor, "*prout patet per eandem*," instead of "*prout patet per recordum*," and that he justified by virtue of the said election; on which justification two issues were tried: the first was, whether the plaintiff was duly elected mayor; the second was, whether he was duly sworn into the office; and the first issue was found for him, and the second against him; and thereupon a general judgment of *amotion* or *ouster* was given against him; *viz.* "*quod PETRUS PINDAR nullo modo se intromittat, &c. sed ab eisdem et eorum quolibet penitus excludetur et amovetur*," but does not say, that this judgment was given upon this information.

And now he moved for a *mandamus*.

The defendant pleaded this judgment of *ouster* against granting that writ.

IT WAS INSISTED for the granting it, that though the judgment of *ouster* was entered against him, yet as his right to be mayor was by virtue of his election, and the right of exercising that

* that office was by virtue of his being sworn, so the judgment against him for usurping the office, not being duly sworn, can be no bar to his exercising it when he is duly sworn. The judgment in this case is like where several issues are tried, and some found for the plaintiff, and some for the defendant. It is true, in such case the Court will give leave to enter judgment for the plaintiff; but they will likewise give the defendant leave to take advantage of the issues found for him, as they appear in the same record. This may be compared to an attainder where the heir or executor of the person attainted brings a writ of error, though in such case he can neither have executor or heir, yet the attainder cannot be pleaded in bar to the writ, for *non valet exceptio ejusdem rei cujus petitur dissolutio*; so in the present case, to return a judgment of *ouster* for not being sworn as a cause why the plaintiff should not now be sworn, is as much as to say you are not sworn, therefore you shall never be sworn, because you exercised this office before you was sworn. It may likewise be compared to a deed of feoffment, where the feoffee enters before livery and seisin made by the attorney who was to make it, he (the attorney) shall never say, that he is not obliged to make livery, because the feoffee entered before it was made. It is true, the plaintiff was not duly sworn at the time he was elected; but if he could not be sworn afterwards, then the charter would be lost, because he is not mayor, not being sworn, and there is no mayor to act in the mean time. If a special information should issue against the mayor for not being sworn, and he is found guilty, certainly he might be sworn afterwards, which is the same case as appears on this record; and most of the cases of this nature are for malfeasances after elections. It is to be considered, that there is a writ of *quo warranto clamat*, &c. and an information in nature of a *quo warranto*, as in this case, that the judgment in the one is final, it being a civil suit, and the king's writ of right; but it is not final in an information in nature of a *quo warranto*; but if it was so generally, yet it could not be so in this case, because the plaintiff's right appears in the same record; therefore a general judgment of *ouster* ought not to be entered, but it should be with a *salvo jure*, as in the king's case; when judgment is given against him in a *quo warranto*. It is true, where the judgment is for the king against the * very liberty claimed, and this upon an information in nature of a *quo warranto*, there it is final. But in the present case, the right of the plaintiff appears on the very face of the record; therefore though the non-swearing may be a good return for not admitting the plaintiff to act, if he should bring a *mandamus* for that purpose, and to have the *insignia* of the office delivered to him, yet it cannot be a good return to this *mandamus*, which is only to swear him. It is true, he has already exercised the office of mayor, but that may be compared to the case of a copyholder who enters before admittance, yet he may be admitted afterwards. It is likewise true, that a *mandamus* has been denied to swear a mayor after the (a) year; but that was

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against
SEALE.

2. Salk. 432
pl. 11.

Co. Ent. 549.
2. Inst. 282.

* [334]
Cro. Jac. 160.
Tel. 150.

1. Inst. 56.

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against
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where he had no right to hold over, and therefore could not be sworn where his right was determined; which is not this case; for here was a power by the charter to hold over; therefore the judgment of *ouster* (though entered generally) should be considered as a judgment *quousque*; for the *ousting* a man from a liberty, or the seizing thereof, is quite different from the ousting one from the officiating in an office. Besides, a *mandamus* gives no right, but puts a man into possession, which may be afterwards disputed by every man who has a right; and therefore a *peremptory mandamus* was desired.

2. Roll. Rep.
46. 92.
Rast. Ent. 540.
Co. Ent. 527.
537. 540. 559.

IT WAS ARGUED for the defendant, that all the right of the plaintiff must be lost by this general judgment of *ouster*; and in this case the election and swearing being but one entire justification, and one of them being found against the plaintiff, judgment final shall be given against him, and he shall not afterwards be admitted to claim any right by virtue of an election precedent to such judgment, because that judgment has extinguished all his right. Now the judgments, both in the writ of *quo warranto*, and in the information in nature of a *quo warranto*, are the same, which appears in several entries; and they differ only where the party is ousted from the franchise, and where it is seized by the king; for where it is entered with a *salvo jure*, there the judgment must be against the king. So, unless the plaintiff can shew some new title, he has no right to be sworn, nor can he be sworn by virtue of any right he claims by the former election, because all that right is determined by this judgment.

* [335]

THE COURT. The question is, Whether *Peter Pindar* has still a subsisting right to enjoy the office of mayor, and that he has not, the defendant returned on this *mandamus* the constitution of the corporation, and to chuse a mayor yearly, who was to act for a year, and until another was duly chosen; they likewise return the information, and the judgment of *ouster*, and rely on the same, the year being out; so that the principal question is, whether this judgment is a good bar to him from being now sworn. It is true, it appears on the same record, that *Peter Pindar* was duly elected, though not sworn: it seems, that by that means he should be precluded from this office; but the judgment given in this case is the constant judgment in such cases, and the Court must take it to be good whilst it is unreversed; therefore taking it abstractly, as the Court must do, without considering whether it is a proper judgment or not, it is as full an motion as can be, and therefore *Peter Pindar* is entirely excluded whilst this judgment stands in force.

For which reason a *peremptory mandamus* was denied.

The King *against* Beecher and Another.

Case 256.

THIS was a motion for a *superfedeas* to a *mandamus* to be directed to the justices of peace to sign a poor-rate made by one part of the parishioners only.

The Court will grant a *mandamus* to justices to sign a *poor rate*, although a former rate, made by part of the parish, was signed before.

By this rate part of the parish was not charged, upon pretence that it was extra-parochial; and there was another rate made by the majority of the parishioners, by which that part of the parish not charged was thereby charged, which last rate was signed by two justices.

So if a *mandamus* should be directed to them to sign this rate, it would contradict what they had already done by signing the other rate, which ought to be determined upon an appeal, before a *mandamus* should be granted for the signing another rate, for otherwise there might be a double appeal.

Comb. 422. 478.
5 Mod. 275.
6. Mod. 229.
Foley, 36, 37.
368.
2 S. H. Cas. 65.
pl. 68.

THE COURT held, that if a *mandamus* was directed to the justices to sign this rate, it would not be contradictory to that which was already signed, nor to themselves, because the contest is between the parishioners, in which the justices are not concerned, therefore they ought to sign this rate, and not contest the right, it being a question of fact between the parishioners, whether this place not charged in this rate, but charged by the other rate, is extraparochial, or not; which is fit to be tried in a feigned issue.

Curth. 450.
B. R. H. 128.

* [336]

* The King *against* Robinson.

Case 257.

MANDAMUS directed to the mayor and aldermen, &c. of, &c. to proceed to the election of a new mayor, who was to be chosen out of the aldermen.

An *attachment* lies for making a frivolous return to a *mandamus*.

The return was, that there were no aldermen, &c.

And now the Court was moved for an *attachment* against the defendant, for that this was rather a banter than a return.

THE COURT. If there be no aldermen, yet an *attachment* must not go, but the plaintiff may have his action for a *faulse return*, or he may traverse the return, if false; so there is no colour for an *attachment*.

But afterwards, upon farther consideration, a rule was made to shew cause, &c.; for if it appear that this was a frivolous return, and purposely made to avoid the justice of the Court, an *attachment* shall go.

Anonymous.

Case 258.

THE PLAINTIFF obtained judgment against the principal for two thousand three hundred and eighteen pounds, which judgment was contested by him so far as he could, even to an

Bail shall pay interest from the time the judgment was had against the principal.

Michaelmas Term, 11. Geo. 1. In B. R.

ANONYMOUS. affirmance in the house of lords, and afterwards the plaintiff obtained a judgment upon a *scire facias* against the bail.

The question now was, Whether they should pay *interest* from the time the judgment was had against the principal?

They offered to pay the principal sum and costs; and it was insisted for the plaintiff, that he ought to have the whole.

And THE COURT inclined to that opinion (a).

(a) See *Bodily v. Bellamy*, 2. Burr. 1094.; and *Frith v. Leroux*, 2. Term Rep. 57.

Case 259.

The King *against* Chandler.

An indictment against a man for secreting a woman big with an illegitimate *fœtus* begotten by him is bad.

S. C. 2. Stra.

612.

S. C. 2. Ld. Ray.

1368.

S. C. 2. Sess.

Caf. 5.

* [337]

Case 260.

* The King *against* Trinity Parish, in Chester.

An order removing children must mention their ages.

S. C. 2. Sess.

Caf. 70.

See Sess. Caf.

82. pl. 84.

Id. 84. pl. 86.

S. P.

THE DEFENDANT was indicted, for that *Alice Hunt* being with child *de illegitimo fœtu*, begotten by him (the defendant), he secreted her so that she could not be had or found to give evidence for the parish against him.

To which indictment the defendant demurred, because there cannot be an *illegitimate fœtus*.

And for that reason the defendant had judgment, for every *fœtus* is legitimate till born, for the parents may marry before the child is born; and if so, then the child is legitimate.

TWO JUSTICES made an order to remove the father and mother, and *John, Elizabeth, and Sarah*, their children, from the parish of, &c. to the parish of, &c.

It was now moved to quash it, because it did not set forth the respective ages of the children, for they might be apprentices, or have served for a year, and so have gained a settlement elsewhere.

And for this reason it was quashed as to the children; but it was good as to the father and mother.

Case 261.

The King *against* Nicholls.

Information against a justice of peace for denying to grant his warrant refused.

A MOTION being made for leave to file an information against the defendant *Nicholls*, who was mayor of *Stafford*, and a justice of peace, for his neglect of public justice in denying a warrant to the prosecutor, who was beaten by T. S.;

A rule was made to shew cause, &c.

And now it was moved to discharge that rule, because the mayor had several people then before him to be examined concerning a riot which happened on that day; and it being late at night, he desired

Michaelmas Term, 11. Geo. 1. In B. R.

desired them to come the next day ; which is the denial of which the prosecutor now complained.

THE KING
against
NICHOLLS.

And thereupon the rule was discharged, because the mayor had done what justice he could ; and the intent of the procuring this rule was to bring him into disgrace, and to inflame the corporation against him.

So the prosecutor was ordered to pay the costs of the motion.

The King against The Mayor of Monmouth.

Case 262.

THIS was likewise a motion for leave to file an information against the defendant for beating the informer, who gave no other provocation than saying to him, who kept an alehouse, " Mr. Mayor, draw me a pot of drink."

Information for
beating the in-
former.

But it being the last day of the Term but one, THE COURT would make no rule to hang over a magistrate's head a whole Vacation.

So it was ordered to be moved the next Term, if they thought fit.

* [338]

* Swetnam against Archer.

Case 263.

PROHIBITION TO THE SPIRITUAL COURT, where the suit was for a faculty for a seat in, &c. (erected in a vacant place of the church, and at his own charge), annexed to his family.

A prohibition lies to the spiritual court to stay proceedings for a faculty for a seat in a church.

The defendant opposed the granting of the faculty, by pleading, that the pew was not erected in a vacant place ; that the pews in the church were pulled down without her consent ; and that this pew was erected in the place where she before had a pew appurtenant to her messuage of S. which she always used to repair ; which plea being rejected by that court,

S. C. Fort. 346.
Noy, 78.
Latch, 116.
Degge, p. 1.
c. 12.

The plaintiff now moved for a prohibition, on a suggestion, that all prescriptions and customs are triable only at common law ; and that the defendant claims the said pew, having always repaired the same : and on affidavit of the truth of the suggestion, and of her pleading the same below (a),

3. Inst. 202.
2. Roll. Abr. 288.
Giff. 198.
1. Will. 326.
2. Salk. 551.
Ld. Ray. 755.

It was opposed, because the church was new built by the parishioners, and for that reason there could be no prescription to the seats, but that they were in the gift of the bishop (b) ; and so a consultation was prayed.

The plea tendered by the defendant was such as could not be tried in the spiritual court, because they cannot hold plea of the inheritance of the seats, nor of any thing which concerns the freehold.

(a) Noy, 129. Cro. Jac. 366.

(b) 2. Bulst. 150.

SWETNAM
against
ARCHER.

THE COURT. By the suggestion it appears, that the *prescription* was pleaded below ; which tied up the hands of **THE ORDINARY** from any further proceeding ; for the spiritual court cannot try a prescription. The ordinary has a right to dispose of all vacant seats in the aisle ; but he cannot intermeddle with a temporal right. The suggestion is, that the pew was pulled down without the defendant's leave ; which cannot devert her of her right, though it be executed at the charge of the parish. Here appear both the causes of prohibition : first, Want of jurisdiction ; and, secondly, Want of trial.

Let there be a prohibition.

Case 264.

Archer against Swetnam.

A libel lies in the spiritual court for defaming the established religion.

MOTION for a prohibition to the spiritual court, the plaintiff being prosecuted there for saying, " I would not be of the communion of **THE CHURCH OF ENGLAND** upon any consideration, for I believe if I was I should be damned."

5. Co. 9.
Co. Lit. 96.
Hard. 406.
2. Will. 79.
1. Burr. 240.
6. Com. Dig.
" Prohibition"
(G. 1.).

The reason offered for the prohibition was, because the libel was for a contempt against the Common-Prayer Book, whereas this was not such an offence.

THE COURT was of opinion, that though it is not an offence against the Common-Prayer Book, yet it is certainly of spiritual cognizance.

Therefore the prohibition was denied.

Case 265.

Brown against Coombs.

An attorney cannot be bail.

A NO OBJECTION was made against the bail in this cause, for that it is against the rule of this court to take an attorney bail.

THE COURT. It is very true, there was such a rule (a), but the intention of making it was, that an attorney shall not be taken as good bail, merely by his being an attorney ; but when he is responsible, and justifies, and is a housekeeper, then, though he is an attorney, he is good bail (b).

(a) Made in Michaelmas Term 1654, Dougl. 466.

(b) But by a rule of the Court made in Michaelmas Term 14. Geo. 2. " No attorney shall be admitted as bail in any action depending in this court : " and this rule has been extended to attorney's clerks, *Dologue v. Vautrin*, Cowp. 128. ; and the same rule and decision has been made in the common pleas, *Laing v. Cundale*, 1. H. Bl. Rep. 76. But

this rule does not apply to criminal cases, *Rex v. Bowes*, Dougl. 466. *notis* ; and if an attorney, or other person not permitted to become bail, be put into a bail-pledge, and not excepted to, the plaintiff cannot take an assignment of bail-bond and proceed as if no bail had been put in, *Thompson v. Roubell*, Easter, 22. Geo. 3. — See *Jackson v. Trundle*, 2. Bl. Rep. 1180. But if objected to, he cannot justify, Dougl. 466.

The King *against* The Churchwarden of Rotherhithe, Case 266.
in Surrey.

A MOTION for a *mandamus* to the new churchwardens and overseers of the poor, to make a rate to re-imburse the old ones the several sums by them expended for * the maintaining the poor the last year, was denied; it having already been resolved, in *Tawney's Case* (a), that a *mandamus* cannot be granted to the new overseers to make a rate to raise money to re-imburse the old overseers (b), but only to raise money for the relief of the poor; for so is the statute 43. *Eliz.* c. 2. expressly, and must be pursued; and an overseer is not bound to lay out money until he has it; if he do, he must make a new rate for relief of the poor, out of which he may retain so much as will pay himself (c).

(a) 2. Salk. 531. 6. Mod. 97.
2. Ld. Ray. 1009.

(b) A rate made by overseers "for the necessary relief of the poor, and towards payment of money borrowed for repairing and rebuilding the workhouse," is bad,

Rex v. Wavel, Dougl. 115. But a rate to re-imburse overseers monies expended in law proceedings is good, Rex v. Mickiefield, 1. Bott P. L. 78. pl. 107.

(c) See 17. *Clare* c. 38. s. 12.

HILARY TERM,

The Eleventh of George the First,

IN

The King's Bench.

1725.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt. .

Sir John Fortescue Aland, Knt. } Justices.

Sir Robert Raymond, Knt. (a) }

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

(a) *Sir Robert Raymond*, being one of the Commissioners of the Great Seal, was absent from the Court of King's Bench during the whole of this Term, 1. Stra. 619.

Strong against How.

Case 267.

THE DEFENDANT, who was an attorney, had deeds delivered to him by the plaintiff, and gave a note under his hand to re-deliver them safe, whole, and uncanceled, to the plaintiff upon demand; which not being done, the plaintiff moved for an *attachment* against him, and obtained a rule for the defendant to shew cause why that writ should not go.

Afterwards it was shewed for cause, that these deeds were delivered to the defendant by the order of the plaintiff's brother, to be laid before Counsel for his opinion, and did not come to his possession, as an attorney, in the way of his business; and that he delivered the deeds to the Counsel, who delivered them to a per- Court will *attach* him for not delivering them.—S. C. 1. Stra. 621. Ante, 307. 1. Stra. 547. Dougl. 104. 238. 3. Term Rep. 275.

STRONG
against
How.

son who lent his brother * two hundred pounds on a mortgage of his estate, so that he (the defendant) could not have them back again; and therefore the Court will not grant an *attachment* for not returning them when it is impossible it should be done, especially since, if the plaintiff has any right to the deeds, he may recover them in an action of *trover*, or by a *bill in equity*.

THE COURT. It is an established rule of this court, wherever deeds or writings come to an attorney in the way of his business, to compel him to re-deliver them to the person of whom he received them; for as he is entrusted with them, the Court will compel him to execute the trust, he being subject to the justice of this court: and it is not material, whether he is an attorney of this court, or not, if he practises therein; and the other courts have the same power over the attornies of this court; and they have gone so far as to compel a Counsel to deliver up the writings entrusted with him. As to suing for them, it would be very inconvenient to put the deliverer to a suit, either at law or in equity; for he may not be able to defend his possession for want of them.

Whereupon the rule was made absolute (a).

(a) See the case of Sir Richard Hughes *v.* Mayre, 3. Term Rep. 275.

Case 268.

Anonymous.

Where bail
are discharged
upon the surren-
der of the prin-
cipal.

Ante, 131.

6. Mod. 233.

7. Stra. 198.

1. Id. Ray

157.

Tidd's Pract.

145.

1. Wils. 270.

4. Burr. 2134.

3. Burr. 1360.

1. Pl. Rep. 323.

1. Rac. Abr

"Bail" (D.).

THE practice of the court of king's bench is, that where judgment is obtained against the principal, the bail may surrender him at any time before the return of the first *scire facias*, where it is afterwards returned *scire feci*, or at any time before the return of the second *scire facias*, where two *nihil*s are returned. And if the plaintiff proceed by action of debt on the recognizance, the bail may surrender the principal within eight days after the return of the writ.

The principal case was an action of debt on the recognizance against the bail, and the writ was returnable the effoin-day of the Term, and the principal was surrendered, and an *exoneretur* entered on the bail-piece the fourteenth day of January.

So it was moved, that the bail might be discharged;

And they were discharged accordingly.

Case 269.

Matthias Carter's Case.

To sell *protec-
tions* in the name
of a peer is a
contempt of
privilege.

ON Thursday the fourth day of February 1724, one Matthias Carter, gentleman to the Earl of Suffolk, was, by order of THE HOUSE OF PEERS, committed to NEWGATE, on proof of his being guilty of procuring and selling written *protections*, from and in the name of that PEER, to several persons, to the great damage of

of * their creditors, and in breach of the standing orders of that house.

MATTHIAS
CARTER'S
CASE.

And he was also found guilty of an unlawful combination with others to charge falsely on their oaths certain persons for speaking scandalous and insolent words, reflecting on the house of peers, and was sentenced to pay a fine of twenty nobles, to suffer three months imprisonment, and to stand twice in the pillory. All which was done accordingly, without any trial by jury.

The house of
peers may com-
mit for conspir-
ing to charge a
person with
slander of the
house.

Ante, 179.

1. Roll. 262. 5. Com. Dig. "Parliament" (L. 11.).

King and his Wife against Basingham.

Case 270.

ASSUMPSIT, &c. in which the plaintiff declared for money lent by the husband and wife, &c. and that it was not paid, *ad damnum ipsorum*: and a verdict was given for the plaintiff.

Assumpsit for
money lent by
husband and
wife *ad damnum*
ipsorum is bad.

S. C. ante, 199.

Cro. Jac. 644.

473.

Salk. 114. pl. 2.

6. Mod. 149.

3. Mod. 120.

5. Com. D. 3.

"Pleader"

(2. A.).

Andr. 242.

IT WAS MOVED *in arrest of judgment*, that the declaration was ill; for it is plain the wife can have no property in the money of the husband. Besides, by this sort of declaring the right would survive to the wife, whereas it ought to go to the executors of the husband. It is true, that where there is an express promise made to the wife, for some special act by her done, and where the duty would survive, they may declare *ad damnum ipsorum*; as where they declared, for that the defendant was indebted to them for work done by the wife in making a peruke for the defendant, he promised to pay, but had not paid, *ad damnum ipsorum*, this was held well enough (a); but in trover by husband and wife, in which they declared *quod cum possessionati fuerunt*, &c. and that the defendant had converted, &c. *ad damnum ipsorum*, this was adjudged ill after a verdict, because both the possession and property was in the husband (b).

IT WAS INSISTED *for the plaintiff*, that if this declaration can be supported by any intendment, it ought, after a verdict, to be made in favour of the plaintiff's right. Now this may be the money lent by the wife before the marriage, and the promise made to her and the husband after marriage (c). If this had been an action of covenant, on a covenant made to them, it would have been good (d); and so it would in a joint action brought by them for rent on a lease made to them (e), or in an action of debt on a bond made to them (f): so where the wife paid a marriage-portion, and a promise was made to her to repay it; and the action was brought by her and her husband (g); so where an action on the case was brought by the husband and wife against an executor, upon a

Cro. El. 61.

Sid. 25.

Hilliard v.

Hanbridge, Al-
len, 37.

(a) Buckley v. Collier, 1. Salk. 114.
—See also Brashford v. Buckingham and
his Wife, Cro. Jac. 77.

(b) Jones, 325.

(c) 1. Salk. 117. 1. Ld. Ray. 368.
2. Mod. 207.

(d) 1. Roll. Abr. 348.

(e) Cro. Eliz. 700. 537.

(f) Co. Lit. 55.

(g) See 2. Com. Dig. "Baron et
"Feme" (V.).

KING
AND HIS WIFE
against
BASINGHAM.

promise made by * his testator after coverture to pay eight pounds a year to the wife during her coverture; after a verdict for the plaintiff, it was moved in arrest of judgment, that the action should be brought by the husband alone, because the whole benefit was to him, for that the promise was made since the marriage; but it was adjudged, that the husband alone might bring the action or join his wife (a).

THE COURT inclined against the plaintiff, for it being laid *ad damnum ipsorum* made the declaration ill; and so it was adjudged in *Cre. Jac.* 479.

(a)

Case 271,

Myer against Yellop.

Attachment
cannot be granted
for a *rescous*
before the sheriff
has returned
the writ. Ante, 110. *Cæsar v. Holt*, S. P.

A N ATTACHMENT was granted upon affidavits made against the defendant for a *rescous*, and this was before the sheriff had returned his writ, which being contrary to the old practice in such cases, it was set aside.

Case 272.

Read against Marshall.

Where the wife
need not be
joined with the
husband in the
action.

THE PLAINTIFF brought an action against the defendant for entering his house, taking away his goods, and for beating his wife, and had judgment by default; and upon a writ of inquiry, the jury gave one hundred pounds damages.

S. C. ante, 26.

The defendant moved in arrest of judgment, that the wife ought to be joined in this action.

S. C. Fortes.

377.

Cro. Jac. 501,

TO WHICH it was answered, that beating the wife was only laid to aggravate the damages.

502. 538.

Ruffell et Ux.

v. Corne, Salk.

119.

THE COURT seemed to be of that opinion (a).

(a) It is said, S. C. Fort. 377. that it was held well, though the wife did not join.

Case 273.

Anonymous.

A bail-bond
wherein the
obligor is bound
in *quadrant libris*
is good.

UPON A MOTION in arrest of judgment in an action of debt upon a bail-bond, wherein the obligor was bound in *quadrant libris*, conditioned, that T. S. should appear on the return of the writ.

Cromwell v.

Grunder, Salk.

462.

2. Lev. 166.

5. Mod. 281.

The objection was, that the word "*quadrant*" is insensible; it is true, if the condition had been for payment of money, so that it might explain what was meant in the bond, it might be good; but where the bond is single, or the condition is for doing some collateral act (as in this case it was), which does not explain what sum is intended in the bond, there it is void.

To

* To WHICH *it was answered*, that it may be well on the roll. *Anonymous.*

THE COURT thereupon stayed all proceedings until THE ROLL was brought in; and said, though the condition of this bond was collateral, yet the bond being made according to the statute 13. Car. 2. c. 2. by which it is enacted, "that none arrested by process, &c. in which the true cause of action is not expressed, and for which the defendant is bailable, by virtue of the statute 23. Hen. 6. c. 10. shall be forced to enter into a bond, with sureties for appearing, in any sum exceeding forty pounds," and the condition of this bond being for appearing, &c. that may explain what is intended by the word "*quadrant*" in the bond, viz. forty pounds, according to the statute.

Cotton against Owen.

Case 274.

REPLEVIN for taking his goods. The defendant avowed, and justified the taking *damage feasant*. The plaintiff replied, that the goods were there, &c. by virtue of a demise made to him by the avowant himself; and that he entered and was possessed, &c. The defendant rejoined, and traversed the possession, but gave no answer to the demise set forth in the replication to be made by himself. For which reason the plaintiff demurred, and the defendant joined in demurrer.

A rejoinder which does not support the bar is bad on demurrer.
Co. Lit. 303.
1 Saund. 377.
1. Will. 141.
5. Com. Dig.
"Pleader"
(H.).

IT WAS INSISTED *for the plaintiff*, that since the traverse of the possession was immaterial, and nothing said as to the demise (a), the plaintiff ought to have judgment.

And accordingly judgment was given for him.

(a), 11. Co. 10. Hob. 81.

Perry against Kirk.

Case 275.

IN AN ACTION brought against the defendant for goods sold and delivered, the plaintiff declared in *assumpsit*, and in his declaration laid several counts, and also declared on a *promissory note*. Upon *non assumpsit* pleaded, the parties were at issue.

A latitat may be sued out before cause of action, but the plaintiff cannot declare before the cause of action arises.

THE COUNSEL *for the defendant* insisted, at the trial of the cause, on a special agreement; and that the defendant did not owe the plaintiff anything at the time of the arrest; and for that purpose he insisted, that the plaintiff might produce this note, for he only proved the sale and delivery of the goods, whereas he ought not to proceed on that count and no other.

* [344]
S. P. Ventr. 28.
S. P. Barnard.
K. B. 57.
Cro. Eliz. 271.
Cro. Jac. 661.
1. Will. 142.
2. Burr. 967.
Doug. 62.

THE COUNSEL *for the plaintiff* * thereupon produced the note dated the eighteenth of April 1724, which was for the payment of sixty pounds.

Tidd's Pract. 189. Cowp. 454. 1. Com. Dig. "Action" (E.).

PERRY
against
KERR.

THE COUNSEL for the defendant then produced a receipt under the plaintiff's hand, by which it appeared, that the defendant was to have six weeks time from the date of the note to pay this money; therefore the plaintiff cannot maintain this action, because the process against the defendant bears *teste* on the eighteenth May; so the six weeks were not yet expired.

To WHICH it was answered, that the declaration was of *Trinity Term*, which was above six weeks after the date of the note, and that is the only thing of which the Court ought to take notice; for the original process was only to bring the defendant *in custodia marischalli*, which may well be before the cause of action.

THE COURT held that to be the constant difference; for the plaintiff may sue out a *latitat* before the cause of action, but he cannot declare until after the cause of action arises (a).

(a) *Foster v. Bonner*, Cowp. 454. *Ward v. Honeywood*, Dougl. 61.

Case 276.

Ancell against Sloman.

A plaintiff
who sues *in for-*
ma pauperis shall
pay no costs on a
nonsuit.

THE PLAINTIFF being admitted *in forma pauperis* by this Court, brought an action against the defendant, in which he was nonsuited, and was taken in execution for the costs of this nonsuit, having an estate fallen to him since.

IT WAS MOVED, that he might be discharged, because by the statute 23. Hen. 8. c. 15. he who sues *in forma pauperis* shall pay no costs, but shall suffer such punishment as the Court shall think fit.

THE COURT was of opinion, that if the plaintiff was a pauper when the cause was tried, he shall not pay costs, and the descent of lands to him shall not have relation to that time.

So A RULE was made to discharge him.

Case 277.

The King against The Officers of St. Mary's Parish in Marlborough.

Mandamus to the
justices to make
a rate for the re-
lief of the poor.

MANDAMUS to the justices to make a rate for the support of the poor of the parish of *St. Mary* in *Marlborough*.

It was opposed, because the parish officers ought to make the rate, and the justices are only to sign it.

To WHICH it was answered, that this motion was grounded on the statute 43. Eliz. c. 2. §. 3. by which it is enacted, "That if
" the justices of the peace do perceive that the inhabitants * of any
" parish are not able to levy among themselves sufficient sums of
" money for the maintenance of their poor, that then the said two
" justices shall and may tax, rate, and assess, as aforesaid, any other
" of

S. C. 1. Stra.
700
2. Sess. Cases,
65.

Hilary Term, 11. Geo. 1. In B. R.

" of other parishes, or out of any parish within the hundred
 " where the said parish is, to pay such sum and sums of money to
 " the churchwardens and overseers of the said poor parish, for the
 " said purposes, as the said justices shall think fit, according to the
 " intent of this law."

THE KING
 against
 THE OFFICERS
 OF ST. MARY'S
 PARISH, IN
 MARLBOROUGH.

Thereupon a *mandamus* was granted, directed to the justices ;
 and, *PÉR CURIAM*, as this is a matter of right, they ought to make
 a return (a).

(a) The justices made an order, that
 the parish shall contribute "so long as we
 " shall think fit ;" and it was quashed,
 because the direction given to the justices
 by the 43. *Elizabeth*. c. 2. s. 3. is only as to the

quantum, and not to the *duration*, of the
 contribution. 1. *Str.* 700. S. C. 16.
Viner Abr. 416. Mr. Conft's edit. *Bott's*
P. L. 1 vol. 306.

Phillips against Doelittle.

Café 278.

A LEASE was made, reserving rent ; and for non-payment
 thereof, that the lessor might re-enter. The rent was not
 paid ; and thereupon the plaintiff brought an ejectment, and had
 judgment.

In ejectment for
 non-payment of
 rent, the pro-
 ceedings may be
 stayed upon
 bringing in the
 rent, and costs,
 and although the
 plaintiff has ob-
 tained judg-
 ment.
Amc. 205.
Doit. 379.

A MOTION was now made to stay the proceedings upon pay-
 ment of what rent was due, and all the costs to this present time.

A RULE was thereupon made, that the defendant should go
 before THE MASTER, &c. and that he should take an account
 of what rent was due, &c. and that proceedings should stay in
 the mean time (a).

Ejp. Dic. 230.
Jones, 280.
Salk. 596.
5. Com. Dig.
 "Pleader"
 (C. 10.).

Afterwards it was moved to discharge this rule, because it was
 made on an extraordinary motion ; for the common motion is to stop
 proceedings on payment of what was due ; now there can be no
 proceedings after judgment.

To WHICH it was answered, that though the plaintiff had judg-
 ment, yet this was a proper motion where such judgment was in
 ejectment ; and this entirely depends on the rules of the court.

CURIA. The Court usually stays proceedings in ejectment on
 reasonable terms, at any time before execution executed.

But in this case IT WAS RULED, that if the defendant did not
 bring in to THE MASTER, within three days, what rent was
 justly due, and the costs, that then the plaintiff might take out
 execution (b).

(a) See 4. *Geo.* 2. c. 2.

(b) See *Downes v. Turner*, *Salk.* 597.
Smith v. Parks, 10. *Mod.* 383. *Withers v. Sturdy*, *Bull. N. P.* 97.—See
 also the statute 4. *Geo.* 2. c. 28. and the

case of *Goodtitle v. Holdfast*, 2. *Str.* 900.
 and *Stevenson v. Mought*, 2. *Black.*
Rep. 746. *Holdfast v. Morris*, 1. *Will.*
 115.

Cafe 279.

Martin against Pritchard.

Where payment before the day is payment at the day.

S. C. 1. Stra. 622.
5. Co. 43.
Cro. Elz. 823.
672.
2. Mod. 33.
Salk. 519.
Stra. 601.
2. Will. 173.
2. Burr. 944.
3. Term Rep. 599.
5. Com. Dig. "Pleader"
(2. W. 29.).

AN ACTION OF DEBT was brought in the court of common pleas, on a bond conditioned to pay a hundred pounds with interest on the fifth day of *December*, &c. The defendant pleaded, that after making the bond, *et ante diem impetrationis brevis originalis, videlicet*, on the first of *December*, he paid the money, &c. The plaintiff replied, "*non solvit modo et forma*." The defendant demurred specially, for that payment before the day was no good plea. The plaintiff joined in demurrer; and judgment was given for the plaintiff in the court of common pleas.

A writ of error was brought in this court.

* STRANGE argued, that the replication was ill, having put in issue a day which is not material, as in the case of *Merril v. Joceline* (a); where, in debt on bond, the defendant pleaded payment before the day; and plaintiff in his replication took issue thereon, and the issue was held immaterial. The day in the plea, though coming after the *videlicet*, cannot be rejected (b); for it is not inconsistent with any matter precedent.

THE COURT. In the case of *Merril v. Joceline*, the defendant should have pleaded *solvit ad diem*; but having pleaded a payment before the day, the point in issue only turned on that fact, which made the issue material only if found one way; therefore in that case the plaintiff should have demurred. In this case the day is intirely immaterial; this is a plea upon the statute of 4. & 5. *Anne*, c. 16. so that the question is only, whether the principal and interest was paid before the original sued. If an original be produced subsequent to the first of *December*, the plea will be good; for the day is only form.

The judgment was affirmed (c).

(a) 10. Mod. 147.

(b) Cro. Jac. 550. 586.

(c) See *Crowne* and *Barry*, 2. Stra.

Rep. 210. 2. Burr. 944. *Winch v.*

Parsons, Buller N. P. 174. *Sturdy v.*

Arnaud, 3. Term Rep. 601.

954. *Fletcher* & *Hennington*, 1. Black.

Cafe 280.

Parsons against Peacock.

An executory devise to two, upon a contingent of a third dying in the lifetime of those two.

REPLEVIN. The defendant avowed for a *rent charge* devised by his grandfather to his uncle, and his heirs, which was now descended on him, this avowant. The plaintiff, in his replication, confessed the devise, but set forth a clause in the same will by which the *rent-charge* was to cease.

* [347]
S. C. 2. Eq. Atr. 340.
2. Lev. 136.
2. Salk. 229. 238.
2. Com. Dig. "Dev. &c."

* The case was thus: *A.* being seized in fee, and having three sons, devised *Black-Acre* to *Giles* his eldest son, and to his heirs, and *White-Acre* to *Edward* his second son, and his heirs, and a *rent-charge* of fifty pounds a year, issuing out of *White-Acre*, to *Roger* his youngest son, and his heirs; "proviso, that if either of
" his

Hilary Term, 11. Geo. 1. In B. R.

“ his sons should die without issue, living the other two, so as his
“ estate in lands should come to the other two sons, then the rent
“ should cease.” *Giles* died, leaving issue *John Peacock*, the
defendant; and *Roger* died without issue.

PARSONS
against
PEACOCK.

This contingency could never happen, because *Giles* had issue, and he being dead, and *Roger* likewise, without issue, their estate in lands could never come to two, where *Edward* alone was surviving; therefore the rent-charge must descend to the defendant as heir at law, being the son of *Giles*, the eldest son of the testator; for this is an *executory devise* to two on the contingency of one dying in the life-time of the other two, which contingency must arise within the compass of one life, otherwise it is void; for it is plain, that the testator intended this benefit of survivorship during his sons lives only.

And THE COURT being of that opinion, judgment was given for the defendant.

Memorandum.

Case 281.

SIR JOHN PRATT, *Chief Justice* of the Court of King's Bench, died on *Wednesday* the twenty-fourth day of *February* 1725. He was succeeded on the third of *March* following by SIR ROBERT RAYMOND, *Knight*.

E A S T E R T E R M,

The Eleventh of George the First,

I N,

The King's Bench.

1725.

Sir Robert Raymond, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir John Fortescue Aland, Knt. Justices.

James Reynolds, Esq.

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Heavyfide *against* Davis.

Case 282.

BY the statute 5. Geo. 1. c. 24. (a) it is enacted, "That if
" the commissioners shall certify to the lord chancellor, that
" the bankrupt hath made a full discovery of his estate, and
" if four parts in five in number and value of the creditors shall
" sign such certificate, and testify their consent to the allowance
" thereof, and if it is allowed by the lord chancellor, then if the
" bankrupt be taken in execution, he, upon producing such certi-
" ficate allowed and confirmed, &c. shall be discharged by any
" Judge of that court whereip the judgment was obtained."

Bankruptcy in the principal shall not avoid a judgment regularly obtained against the bail.

In the principal case, there was judgment against the defendant, who became a bankrupt, and the plaintiff did not come before the commissioners to prove his debt, but took out a *scire facias* against the bail; and after two *nibils* returned, had judgment against them, and they were taken in execution.

(a) See 5. Geo. 2. c. 30. s. 10. & 13.

THE KING
against
BUFLER.

the mayor continued *Hunt* bailiff for the next year, viz. for the year 1723, being the year of his mayoralty.

* [351]

Thereupon an information in nature of a *quo warranto* was granted both against *the mayor* and *Hunt*, suggesting that no man could be mayor or bailiff there who was non-resident, * and chosen by non-residents, and that both *the mayor* and *bailiff* were non-residents, and therefore had usurped a franchise. And at the trial a verdict was found for *the mayor*, that he was an inhabitant resident, and against *Hunt*, that he was non-resident; thereupon the mayor named one *Page* to be bailiff.

THE QUESTION now was, Whether the mayor could name a new bailiff; or, Whether one *Neeve*, who was bailiff before this mayor was elected, should continue bailiff, because, by the constitution of this corporation, a bailiff duly elected is to continue in his office for a year, and until another is duly chosen, and *Hunt* was never duly chosen, because he was non-resident.

And this being a controverted point, another information, &c. was granted to try it.

PER CURIAM. Informations in nature of a *quo warranto* may be brought (with leave of the Court) at the relation of any person desiring to prosecute; and this is by virtue of the statute 9. Ann. c. 20. the end of which statute was to prevent frivolous and vexatious controversies, and therefore informations were not to be filed without leave of the Court; but the question in this case seemed doubtful, and since it is controverted it ought to be tried.

Case 287.

Phillibrown against Ryland.

A declaration for shutting a parishioner out of a room where the vestry was held, must shew that he had a right to enter into that room.
S. C. ante, 52.
S. C. 1. Stra. 624.
S. C. 2. Id. Ray. 1388.
1. Com. Dig. "Action on the Case" (A.).

THIS was a special action on the case brought by a parishioner against the defendant, for shutting him out of THE VESTRY, he having offered to come in and vote amongst the parishioners.

The plaintiff declared, that public notice was given for an assembly to be held in THE VESTRY-ROOM, adjoining to the church, being the usual place for meeting; that every parishioner who paid scot and lot had a right to be present and vote at THE VESTRY; that the plaintiff was a parishioner, &c. and paid scot and lot, and was coming to the said vestry, but was shut out by the defendant, so that he could not be present and give his vote at the meeting of the parishioners, and consulting for the good of the parish, *per quod*, &c.

The defendant demurred specially, to this declaration, for that the plaintiff did not shew any special damage by his being shut out.

The plaintiff joined in demurrer.

IT WAS ARGUED *for the defendant,*

PHILLIBROWN
against
RYLAND.

FIRST, That an action on the case could not be maintained, without shewing some special damage.

SECONDLY, That where several have a right in common with * others, the law will not allow that one of them shall have an action; because this would create multiplicity of suits. The offence in this case was shutting the door; which is an offence equally to every inhabitant, being equally a damage to each; and therefore ought not to be punished by action, which would be infinite, but as a nuisance, by indictment or information: as for instance, where a man stops up a way, the law will not allow an action to be brought against him by one, without shewing some special damage to himself; for the consequential damage which may happen by stopping the way, will not support an action (a). So where the custom of the manor was for the copyholders to name their successors; and a copyholder having named one to succeed him, the lord refused to admit him, for which he brought an action, but it was adjudged, that it did (b) not lie (c); for if one might bring an action, every one might do the like; therefore to avoid multiplicity of actions, it was held that this action would not lie. So where a lord of a manor brought an action against the vicar, for not celebrating the sacraments in his parish church (d), it was adjudged that it would not lie, because the right to receive them was in common to all the parishioners, and he had laid the right in himself *et in omnibus tenementibus suis*, but it might have been otherwise if he had laid the right in himself and family. And the reason why the action would not lie is, because the not celebrating the sacraments was an equal damage to all the parishioners, and therefore one alone shall not bring an action; for if he might, it would multiply actions, which the law will not allow: besides, the plaintiff had a proper remedy in the spiritual court. And all this was adjudged in *Williams's Case* (e), which was an action for a common nuisance in the highway; and it was held that it would not lie, because it was unreasonable that any particular person should have an action where the damage was in common to many; for if he should, then every man might have the like action against the defendant, and so he would be punished many times for the same cause; but if one has a more particular damage done to him than another, in such case he may have an action for that particular injury, but not for a nuisance, because that is common to all people: and the common law has appointed another method to punish offenders of that nature, *viz.* by presentment at the leet, or by indictment. So where an action was brought by one of the inhabitants of *Littlebury* against the defendant, for not keeping up an ancient ferry-boat there, for them to pass over the river toll-

* [352]

(a) Cro. Eliz. 84. 466.

(c)

(b) The chief reason was, because the copyholder before admittance had neither *ius in re* nor *ad rem*. Cro. Jac. 368. p. 1.

(d)

(e) 5. Co. 73.

BRILLIANT
against
RYLAND.

* [353]

free, it was held, that this action would not lie (a), because the not keeping up the ferry-boat was a damage to all people who * had occasion to pass that way, but the not paying toll was an easement to the inhabitants of that vill only; but an action would lie by an inhabitant of *Littlebury* for taking toll, for that is a private right. So where the plaintiff brought an action for stopping a highway near his colliery, the Court was divided whether the action would lie (b), for that it was the king's highway, and the plaintiff had only a convenience to pass, but no right to the way.

THIRDLY, But admitting this action would lie, yet this declaration is not good, because the plaintiff did not set forth any legal or prescriptive right in the parishioners to meet at a vestry. The plaintiff should have alledged a right in the inhabitants, time whereof, &c. to be present and vote; for otherwise there may be a select vestry, which was the case here; and the intent of this action was to try the validity of select vestries. It is true, he alledges that every parishioner who paid scot and lot had a right to be present and vote, &c. but that might be a voluntary right, for the parishioners are no body politick to take any legal or prescriptive right.

FOURTHLY, Besides, the plaintiff did not set forth that the parishioners had a right to meet in this room, and if they had no such right, then the action will not lie for shutting the plaintiff out of that room, for it may be in the defendant's own house, or in the house of some other person where the plaintiff had no right to enter. As trespass will not lie for taking goods from the person of the plaintiff, unless he shews that they were his own goods (c), for they might be the defendant's goods for any thing that appears to the contrary.

FIFTHLY, Neither did the plaintiff shew, that the right was in all the parishioners, or that this was a select vestry.

THOSE WHO ARGUED for the plaintiff answered the objections made by the defendant's Counsel.

FIRST, As to the objection, that this was *damnum sine injuria*, and that the plaintiff should shew some special damage to himself, &c. it is true, an action will not lie for a damage without an injury; but it does not follow from thence, that an action will not lie for an injury without shewing some special damage; for every injury implies a damage, which is fully proved by the cases in the margin (d).

(a) This is the case of *Payne v. Partidge*, 3. Mod. 289. 1. Show. 243.

(b) *Preson v. More*, 1. Salk. 115. 5. C. Comy. Rep. 58. But this case was afterwards argued before all the Justices of the Common Pleas and Barons of the Exchequer at *Serjeants Inn*, and they were all of opinion for the plaintiff, that the

action well lay. S. C. 1. Ld. Ray. 495. S. C. 12. Mod. 263.

(c) *Yelv.* 36.

(d) Year Book 11. Hen. 4. pl. 47. Cro. Jac. 478. 1. Roll. Rep. 21. 1. Vent. 266. 2. Vent. 25. 2. Lev. 250. 6. Mod. 45. 1. Salk. 19. 37.

SECONDLY,

SECONDLY, As to the objection, that this action will not lie, for if it should, there would be multiplicity of actions against one person for the same offence, all the cases cited on the other side to that purpose are, where there was another remedy to punish the offender, either by information, presentment, or indictment (a); but in the principal case the plaintiff had no other remedy but by this action, for there was neither a breach of the peace, or any public nuisance.

PHILLIBROWN
against
RYLAND.

THIRDLY, As to the objection made to the form of this declaration, that the plaintiff did not set forth that he had a right to enter the room where the vestry was kept, that is answered by shewing, that there was a general summons for the parishioners to meet on such a day, and in such a room near the church; and admitting it to be the defendant's room, yet if he let it for that day, it is then the room of the parishioners for that day; and this the Court will presume in this case.

* [354]

FOURTHLY, As to the objection, that if the parishioners had any particular right to a select vestry, that matter ought to be set forth by the defendant in pleading, which he had not done, but demurred (b); and the plaintiff had set forth a sufficient right at common-law to entitle him to this action; for he declares, that every parishioner who paid scot and lot had a right to be present and vote, &c. and that he was a parishioner, &c. and paid scot and lot; and the parishioners are a body politic for that purpose, and for many other purposes; parishioners may make rates for repairing their church, and may distrain for such rates (c).

FIFTHLY, That since bye-laws bind the property of every inhabitant, it is reasonable every inhabitant should have a right to dissent from or to approve them. They have power of electing their own officers amenable only to themselves (d). They are a corporation to make bye-laws for mending the highways, and for making banks to keep out the sea, and for repairing the church and making a bridge, &c. or any such thing which is for the public good; all which was resolved in *The Chamberlain of London's Case* (e). And by the statute 3. & 4. Will. 3. c. 11. and 7. Ann. c. 17. s. 4. they are made a body politick to several other purposes, as to tax and levy the rate for maintaining the poor, and to tax the parish to make and maintain engines for extinguishing fires; and by the statute 9. Geo. c. 7. s. 4. they are made a body politick for purchasing work-houses to employ the poor, and consequently

(a) See the case of *Ashby v. White*, 2. Ld. Ray. 949. 6. Mod. 50. 3. St. Tr. 89. 3. Salk. 18.

(b) It was insisted that the right of the plaintiff was confessed by the demurrer; but it was answered, that nothing is confessed by a demurrer but what is well alledged, and that the declaration

was bad in this case for want of proper allegations.—NOTE to the former edition.

(c) Year Book 44. Edw. 3. pl. 19. 1. Mod. 154.

(d) Gibson's Codex, 241. 5. Mod. 325.

(e) 5. Co. 65. See also, S. P. 1. Mod. 154.

PHILLIBROWN
against
RYLAND.

every parishioner hath a right to be present at their publick meetings in a vestry.

RAYMOND, *Chief Justice*. The plaintiff does not shew any right to THE VESTRY to which he claims admittance; so that if he had no right to come in, the shutting the door against him could be no injury to him. But I am of opinion, that this action had been maintainable if a right had been shewn. There is a difference between an act which is a common nuisance, and an act which disturbs the particular right of any persons; for the latter will intitle the persons injured to their several actions, though there may be a hundred or more persons injured.

FORTESCUE, *Justice*. In the case of *Rex v. Soley* (a) the defendant was indicted for taking off the door of the guild-hall of a corporation; which indictment after a verdict was held ill, because no title being shewn to the guild-hall, it might be the freehold of the defendant.

REYNOLDS, *Justice*. The declaration is ill for the objection that was taken. But without difficulty I should hold the action maintainable if the declaration had been good. Every parishioner has a right to assemble, and if illegally obstructed, he has no remedy but by an action on the case. No information can lie unless there be a riot or breach of the peace. The case of *Payne v. Partridge* (b) is a case in point.

Judgment was given for the defendant.

(a)

(b) 1. Salk. 12. pl. 1. S. C. 3. Mod. 289. S. C. Ld. Ray. 493.

* [355]

Case 288.

* Kent against Kerry

An action of dower of three tenements is not good, for the uncertainty of the word "tenement."

DOWER in the common pleas. The plaintiff declared for her dower in three messuages, and three tenements, &c. The tenant confessed the action; upon which judgment was given to recover her dower and damages.

A writ of error was brought in this court, and the errors assigned were,

S. C. 2. Ld. Ray. 1384.
S. C. 2. Stra. 625.
Cro. Jac. 125. 621.
5. Com. Dig. "Pleader"
Y. L. 1.
2. Stra. 834.
Cowp. 346.

FIRST EXCEPTION. That the word "tenement" was of such an uncertain signification in the law, that the sheriff could not deliver possession of it; that by the concurrent authorities in the books, an ejectment will not lie of "a tenement" for the reason before mentioned (a), neither can a fine be levied of it (b).

SECOND EXCEPTION. The plaintiff did not set forth, that her husband died seised, for which reason no damages can be recovered

(a) But see Mr. Nolan's edit. of Strange, 834. and the case of Massy v. Rice, Cowp. 346.

(b) Year Book 3. Edw. 4. pl. 14.

1. Sid. 295. March, 96. Noy, 86.
3. Leon. 28. Cro. Jac. 125. 621. Cro. Car. 188. 3. Mod. 238.

by

by the statute; and yet the sheriff has executed a writ of inquiry of damages, and by virtue of the writ *habere facias seisinam* has delivered to the plaintiff seisin of such a house, &c. or so much thereof as is worth ten pounds a year, which is void for the uncertainty.

K2N7
against
K2N7.

THE COUNSEL for the plaintiff argued, that in dower there was not so much certainty required as in a *præcipe quod reddat*, or other real action, for a writ of dower lies of "a garden," "a croft," or "a cottage (a);" but if it did not lie of "a tenement," yet the tenant coming in, and confessing the action, has made it good; for a plea often aids defects and uncertainty in a declaration. * It is certainly so, where the defendant has pleaded collateral pleas to a declaration where the demand was not sufficiently set out; this is proved by the cases of *Slack v. Bowfal* (b) and *Buckland v. Otley* (c), and by a late case between *Gibley v. Williams* (d). Debt by an administratrix upon a bond; *non est factum* pleaded; and found for the plaintiff; an objection was taken to the declaration for not shewing the letters of administration, nor by whom granted, nor so much as styling herself administratrix of the debts, goods and chattels of the deceased; but it was over-ruled, the plaintiff's title being admitted by the plea.

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As to THE SECOND OBJECTION concerning damages, it is very true, that the plaintiff ought to have set forth, that her husband died seised, &c. and it is a fatal error to omit it; but it is an error for which the judgment for damages shall only be reversed; for in dower the judgment is complete before the damages are recovered; it is like a *quare impedit*, where the first judgment is good by the common-law without damages (e).

THE COURT. Here is a demand made of a specific thing which is to be recovered and assigned by the sheriff. The confession cannot aid the uncertainty. The cases quoted are different; for there money only is to be recovered. "Tenement" is uncertain: The declaration cannot be maintained.

Judgment was reversed.

(a) Year Book 8. Hen. 6. pl. 3.
abridged by Brooke, "Dower" 92.
(b) Cro. Jac. 668.

(c) Cro. Jac. 683.
(d) Hil. Term, 12. Will. 3.
(e) Specter's Case, 5. Co. 57.

Burland against Tyler.

Case 289.

AN ADMINISTRATOR brought an action of debt in the *debet et detinet* against the heir of the obligor, and concluded his declaration, *ad damnum ipsius* the plaintiff, &c.

If a plaintiff as administrator bring an action in the *debet et detinet* against the heir; it is

On demurrer to the plea, which was admitted to be ill,

a fault in form only, and no advantage shall be taken of it, but upon a special demurrer.—S. C. 2. Ld. Ray. 1391.

Top,

BURLAND
against
TYLER,

Mo. 566.
Cro. Eliz. 711.
Cro. Jac. 546.
Lane, 79.
Stile, 232.
5. Rep. 31. a. b.
Lev. 124.
Sid. 342.
5. Con. Dig.
"Pleader"
(2. E. 1.).
1. Bac. Abr.
303.

TOP, for the defendant, insisted that the declaration was naught, to which he took two exceptions:

FIRST, That the action was brought against the heir in the *debet et detinet*, when it should be in the *detinet* only.

SECONDLY, That the declaration concluded, "*ad damnum ipsius the plaintiff*," when it should be *in retardationem administrationis*.

CHAPPLE, Serjeant. The first exception would have been cured, if after a verdict, by statute 16. & 17. Car. 2. c. 8. and if so, it will be cured by statute 4. Ann. c. 16. being after a general demurrer.

THE COURT. The 16. & 17. Car. 2. c. 8. called *The Oxford Act*, cures the defect, if a verdict has passed; and by statute 4. Ann. c. 16. judgment is to be given without respect to any defect in the declaration, unless shewn for cause of demurrer, so as the right of the cause appears.

As to THE SECOND EXCEPTION, this is only matter of form. Besides, the modern precedents are according to this declaration.

And judgment was given for the plaintiff.

* [357]

Case 290.

* The King against Westbury.

Indictment for a rescue must set forth the *fieri facias* at large; setting forth *quod cum virtute brevis, &c. de fieri facias*, and a warrant thereon, he levied the goods, &c. and that the defendant rescued them, is not sufficient.

THIS was an indictment against the defendant, for that T. S. and other bailiffs, &c. did, *virtute brevis domini regis de fieri facias*, and a warrant thereon, levy the goods of M. G. and that the said defendant Westbury with others did assemble, and *riotosè et routosè* did rescue the said goods, and assault and beat the bailiffs, and so disturbed them *in executione brevis et warranti prædicti*.

Upon not guilty pleaded, it was found against the defendant.

It was now moved in arrest of judgment,

FIRST, That the *fieri facias* was not well set forth; for it was "*virtute brevis domini regis de fieri facias*," without setting forth the writ itself, and without mentioning the party's name,

Co. Lit. 303.
5. Co. 121.
4. Com. Dig.
"Indictment"
(C. 3).

SECONDLY, It sets forth, that there was a warrant *secundum exigentiam brevis prædicti*, and that the defendant disturbed the bailiffs *in executione brevis et warranti prædicti*, which is ill; for if there was no writ, there could be no warrant: it is true, this indictment mentions a writ, but it is not well set forth, and if so, the warrant must fail; for the Court can never judge whether it is *secundum exigentiam brevis*, when no good writ appears to be made.

Et contra. This writ is set out by way of circumstance only, *quod cum virtute brevis, &c.* but if there was none, yet the warrant would justify the bailiffs, or maintain this indictment for the wrong done.

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THE COURT. It is very true, the bailiff may defend himself by the warrant, but a writ must be shewn to charge a stranger; and this is the constant difference in such cases; and as this case is, an indictment would have laid for a single battery, but the warrant itself, and the disturbing another in the execution of that warrant, both refer to the writ; and that being not well set forth, those things which refer to it must necessarily fail.

For which reason the judgment was set aside.

THE KING
against
WASTABE

* [358

* The King against Grey.

Case 291.

AN INDICTMENT was found at a quarter-sessions held in Colchester before the justices of peace for the county of Essex, for a nuisance done there by the defendant, by laying pigs of lead in the high-road. Whereby a surrender of a charter the corporation is not dissolved.

The indictment being removed by the defendant into the court of king's bench by *certiorari*, the defendant pleaded, and set forth the charter of King Charles the Second by which this borough was incorporated, and cognizance granted to them to determine all pleas and affairs arising within that town; with a clause that no justices of peace for the county at large shall enter into the said borough, *nec deinde in aliquo se intromittant, nec eorum aliquis se intromittat quovis modo, &c.* and that this indictment was void, being found there before the justices of the county, who had no jurisdiction in the said borough.

THE KING'S CORONER replied, and set forth a surrender of the said charter granted by Charles the Second to this corporation, &c. and of all and every the liberties and franchises therein contained.

The defendant rejoined, and set forth the letters patent of King William and Mary, by which all the lands, privileges and franchises of this corporation were granted, restored, and confirmed to them in as large a manner as at any time they enjoyed before the surrender.

And upon a demurrer to this rejoinder, these points were made.

FIRST, Whether the king can by his charter grant to certain persons, in a certain place, a power exclusive of himself, so that at no time afterwards he can administer justice in the same place: and if it should be admitted, that the king might grant such an exclusive power or jurisdiction, then, Whether he has granted it by these words in the charter, "that the justices of the county shall not enter the borough, *nec se inde in aliquo intromittant, &c.*"

See 2. Stra.
1154.

MR. REEVE for the king, admitting that such an exclusive jurisdiction is granted by this charter, argued, that the manner of demanding cognizance is not legal. It was adjudged in the case of *Manners v. Fern (a)*, that the defendant may plead cognizance

(a) Fort. 158. 10. Mod. 125; 156. 5. Vin. Abr. 58, pl. 22.

THE KING
against
GAY.

as well as the lord may demand it; but it was then held, that he must come the very first instance and make the claim. In this case the defendant ought to have pleaded the cognizance at the quarter-sessions, and not to remove the indictment and then plead it above; he has by so doing elapsed the time allowed by law.

THE CHIEF QUESTION was, Whether by the surrender of the charter made in the thirty-sixth year of *Charles the Second* the corporation was wholly dissolved; for if it was, then the charter of *King William*, by which the lands and privileges were regranted, is void, because it was to a corporation not in being.

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* As to THE FIRST POINT it was argued, that this charter granted in the fifteenth year of *Charles the Second* did not give exclusive cognisance to this corporation, but that there remained a concurrent jurisdiction in the justices of the county; for the words are, that the justices of the county shall not enter the borough, *nec se inde in aliquo intromittant*, that is, they shall not enter to exercise any jurisdiction: but this does not exclude them from entering to take presentments and indictments for any misdemeanors committed there. It is like the grant of a franchise to return writs, but notwithstanding such grant the sheriff is not excluded. So at the best these are doubtful words, and therefore shall never be intended to enlarge the jurisdiction of this corporation, so as to exclude the justices of the county.

THE SECOND POINT (a) was not much insisted on, because if the indictment was void, as taken *coram non iudice*, then there could be no occasion of pleading this exclusive cognisance below and immediately: but supposing there should, a *certiorari* doth not make the merits of the plea worse, for the defendant hath done no act to admit the jurisdiction of the justices. "Therefore this is not like a *claim of cognisance*, &c. because in such case, the act done is only to be avoided by pleading such claim, and that in due time, for otherwise justice might be delayed by an untimely claim.

As to THE THIRD AND CHIEF POINT, it is admitted by the pleadings, that the charter granted by *King Charles the Second*, in the fifteenth year of his reign, was surrendered; and it was insisted, that by such surrender the corporation was absolutely dissolved, and if so, then the charter of *King William* and *Queen Mary* is wholly void, because it is not a grant of creation, but of confirmation and restoring the liberties of a corporation which was not then in being, and so could not take by such grant; and it shall never be taken for a charter of creation and confirmation too, for that would be to a double intent, which the law doth not allow in such cases. Besides, here are no words of creation, and therefore it is like that case in THE YEAR BOOK 9. *Edw. 4. c. 11.* where the king granted an office to T. S. but it was held, if this was not an

Roll. Abr. 513.
(F.) pl. 1.
Co. Rep. 52. a.
Co. Lit. 264. a.
19. *Edw. 4. c. 6.*
d. 11.
1. Co. Rep. 56.

(a) This is wrong placed, it should be part of *Sergeant Cogges'* argument, who have come in fol. 360. a. in aid in behalf of the defendant, for so it was in law, being *former action*.—NOTE to the

office

office before the grant, it was not good, because there were no words of creating this office. So if the king grants such a thing *inhabitantibus de Dale*, this is void, unless they were a corporation before the grant, for the reason before mentioned.

THE KING
against
• GREY.

IT WAS ARGUED *to quash this indictment* as taken *coram non judice*, that by the charter granted in the fifteenth year of *Charles the Second*, an exclusive jurisdiction * was granted to this corporation, and that the justices of peace of the county had none there, for the corporation-men have the authority of justices within their corporation; and the justices of the county are not to enter, or *in aliquo se inde intrmittere*. And so is the *Abbot of St. Alban's Case (a)*, where the king granted a power to him to make justices of peace within the borough of *St. Albans*, *ita quod* the justices of the county of *Hertford* should not intermeddle, in the same words as in the present grant; it was adjudged in that case, that the justices of the county were excluded; and that if they acted in the said borough, it was *coram non judice*, and by consequence void; and all exclusive jurisdictions in letters patents are always in this form of words, and no instance can be given to the contrary. The grant of the return of writs was a particular franchise, and not parallel to this case, because it did not appear upon the record that the sheriff was excluded, or that he had no jurisdiction within that liberty, and it could amount to no more than to exclude the sheriff in person. It is true, the sheriff, notwithstanding such grant, may make a return; but if he doth, it is an injury done to him who had a grant of that franchise, for which he may maintain an action against him.

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AS TO THE CHIEF POINT, that by the surrender of this charter, the corporate body was wholly dissolved, and therefore their liberties could not be restored by the charter of *King William*, because there was no corporate body in being to take; it was argued, that the corporation was not entirely dissolved: it is true, by this surrender all their lands and liberties were given up, but still they had a corporate capacity to take, &c. But admitting that their corporate body was entirely dissolved, yet by the grant of *King William* it appears, that he intended to reinstate them in the same privileges which they had lost, for he gave them the same liberties by way of grant and restitution; the charter of revivor has used the same words as are used in the charter of surrender; and certainly they will have the same effect to re-vest as they had to de-vest; therefore this is not like that case where the king made a grant *inhabitantibus de Dale*, for there he was deceived in his grant, there being no corporation before; and certainly where a corporation is re-inflated by a charter, the king intended to give them a capacity to take; and where his intent appears, and no set form of words are requisite for that purpose in the grant, there his intention shall prevail.

4. Com. Dig.
"Franchises"
(G. 2.).

(a) Year Book 20. Hen. 7. pl. 6, 7, and 8. Brook. Abr. "Patent" III. Crompton's Jurisdiction of Courts, 8.

THE KING
against
CITY.

* THE COURT seemed of different opinions in this case:

20. Hen. 7. c. 6.
See Hardres,
505.
Quere this.

THE CHIEF JUSTICE being of opinion upon the first point, that the king might grant to others so as to exclude himself from administering justice in the same place afterwards; for he is the fountain of jurisdiction as well as of justice, and may distribute it as he thinks convenient; and for this there is an authority in the Year Book 20. Hen. 7.

Dalton, 23.
Lamb. 47.

TWO OTHER JUDGES laid no great stress on that case, for it appears by *Dugdale's Origines Juridiciales*; that there were but two Judges then in court, who held that the king might grant by a charter exclusive to himself: it is true, there can be no inconvenience of failure of justice, if the king had such a power; because, if it is misused or abused, it is forfeited.

Quere this.

And therefore THREE OF THEM HELD, that the king might exclude himself by his charter; which FORTESCUE denied; for that he had still a concurrent jurisdiction which he had granted by commission to the justices of the county; therefore it is not void as to *Colchester*, and good for the rest of the county, but voidable only as to *Colchester*; and if so, there can be no inconvenience in it; because then the corporation may claim their right, and so may the party grieved.

Dalton, 10.

AS TO THE CHIEF POINT, Whether the very being of the corporation was destroyed by this surrender?

THREE OF THE JUDGES held that it was not, and compared it to the surrender of a deed, that the estate was not thereby surrendered, therefore the corporation was still subsisting, and had a capacity to take, and by the charter of *King William* did retake; and it would be very inconvenient if it should be otherwise, (that is) if they could give up more by a surrender than they can take by a regrant. In the great case of the city of *London* several learned men were of opinion, that a surrender did not destroy the being of a corporation; this appears by the surrender of abbies in the reign of *Henry the Eighth*, for it was not thought proper at that time to rest purely on those surrenders, but to have them confirmed by act of parliament. There is a particular proviso in the statute 27. Hen. 8. c. 24. s. 6. that corporations shall have the power of making justices of peace as they had before, which power is mentioned in the statute 22. Hen. 8. c. 5. which act is confirmed by the statute 3. & 4. Phil. & Mary, c. 1; and though the king is empowered by act of parliament to make justices of peace in the counties, it cannot be inferred from thence, but that he may limit and abridge this power to certain precincts in the counties.

Quere this.

* FORTESCUE, *Justice*, held, that though barely by the surrender of this charter the corporation was not dissolved, yet there were other words in it, by which they gave up all the liberties and privileges which they then enjoyed, by which words the very being of this corporation was dissolved; and if so, then the next question will

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will be, whether it was restored by the re-grant of *King William*. For there is no occasion of any set form of words in letters patent of incorporation, for the first and original grants of them was to have *gildam mercatoriam*, therefore by the charter of *King William*, by which all the lands and liberties were granted, restored and confirmed to this corporation, they were actually restored, and intended by the king so to be.

THE KING
against
GREY.

But this being a case of great weight, it was adjourned farther to be argued.

Morice against Lee.

Case 292.

AN ACTION was brought against *the drawer* by the *second indorsee*, upon A NOTE given in these words: "I PROMISE to account with T. S. or his order, for fifty pounds value received by me, &c."

A PROMISSORY
NOTE in these
words, "I PRO-
MISE to ac-
count with T.
S. or his or-
der, for fifty
pounds, value
received, &c."
is a negotiable
note within the
statute 3. & 4.
Ann. c. 9.

After a verdict for the plaintiff,

IT WAS MOVED in arrest of judgment, that this was not a good note within the statute 3. & 4. Ann. c. 9. It is plain it is not within the words of the statute, for those are, "all notes signed after the first of August 1705, by any person promising thereby to pay to another, &c. or order, or bearer, &c. shall be assignable, and the drawee or indorsee to whom the money is payable, may maintain his action for the same against the drawer or indorser." Now this note is not negotiable, because the promise is not to pay money, but to account, and in all promissory notes the drawer must be an absolute debtor, otherwise they cannot be negotiated; but in this note he is not a debtor originally, though he may be so when the account is stated; so this may be between merchant and factor; and therefore if the drawer had applied this money as factor to T. S. he might have avoided the payment of the money by that means. In the case of *Smith v. Bobeme (a)*, in the first year of *George the First*, it was resolved, that where one promised to T. S. to pay seventy pounds, or to surrender the principal; this was not a note assignable within the statute, for it was not negotiable *ab origine*, and shall never be made good by consequence.

S. C. 1. Stra.
629.
S. C. 2. Ld. Ray.
1396.
2. Stra. 706.
1151.
Ld. Ray. 1545.
1. Burr. 373.
5. Com. Dig.
"Merchant"
(2. 16.).

* IT WAS SAID on the other side, that this was a good note within the statute; and if so, the action is well brought by the indorsee. It is true, it is not within the very words of the act of parliament; but the statute ought to be favourably construed, because it was made for the advancement of justice, and for the ease and benefit of traders. It is like the construction which has been made on the statute of waste, where the words are, "*ex dimissione*;" but it has been resolved, that estates *ex provisione legis*, viz. estates by the curtesy, or in dower, are within the equity thereof. Besides.

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(a) 3. Ld. Raym. 63.

Money
against
Law.

the note itself has the badge of A PROMISSORY NOTE, for it is to be accountable to T. S. or his order; which word "accountable" is not so very uncertain (a), for it is laid in the declaration upon an express promise; and therefore good after verdict, especially since the statute doth not prescribe any set form of words in which these promissory notes are to be drawn. The case of *Smith v. Boheme* (b), and so likewise the case of *Appleby v. Biddolph* (c); where the note was in these words, "I PROMISE to pay to T. M. so much money, if my brother doth not pay it within such a time," in both which cases judgment was arrested after a verdict, are authorities not applicable to the principal case; because the drawer was not the original debtor, but might be a debtor upon a contingency.

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* RAYMOND, *Chief Justice*. The act of 3. & 4. Ann. c. 9. is a remedial law, and to be extended in construction as far as in reason we can. The expressions used for these notes always vary. It is sufficient if the substance of the note is a promise to pay money. An employment of this money in factory might have been given in evidence as an excuse for the non-payment; the contrary of which is now to be supposed, since a verdict is found for the plaintiff.

FORTESCUE, *Justice*. The Court will construe this note as a note for payment of money; for a note to account to me or order is absurd. I have seen several promissory notes drawn in this form. A man that receives money to account for, does not receive the money as a duty, but as a trust; therefore no *indebitatus assumpsit* lies, without shewing some misapplication, or breach of trust. Besides, this note is "for value received." If there had been no verdict, I should have thought this a good promissory note: but the verdict has put it beyond all dispute, because now a promise to pay is found. A promissory note in this form had been good, "I PROMISE that J. S. or order shall receive a hundred pounds." The case of *Smith v. Boheme* was no promise to pay at all, but to pay or surrender. No precise form is required for these notes, or for bills of exchange. A bill of exchange may be between two persons, "I PROMISE to pay to myself or to my order." This is a debt, being "for value received," and not said "on account;" whereas a receipt of money to account creates a trust. How can a fourth or fifth indorsee account with the defendant?

REYNOLDS, *Justice*. This had been a good promissory note within the statute, had there been no verdict. No form is prescribed by the statute. The objection that has been generally taken to promissory notes has been, that the money has been payable only out of or upon the credit of such a particular fund, and not dependant on the credit of the drawee; as *Jocelin v. La Serre* (d),

(a) Salk. 9. 139.

(b) 3. Ld. Raym. 63.

(c) Bull. N. P. 272.

(d) Fort. 281. 10. Mod. 294.

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a promissory note to be responsible for a hundred pounds; would be a good promissory note within 3. & 4. Ann. c. 9.

THE COURT gave judgment for the plaintiff.

Moxon
against
L. & L.

The King against The Bishop of Chester.

Case 293.

ERROR of a judgment in a *quare impedit* was brought in the county palatine of *Lancaster*, against the *Bishop of Chester*, for refusing to admit one *Peploe* to the wardenship of *Manchester College* upon the presentation of the king.

Faculty granted by the archbishop need not be subscribed, registered, or enrolled by the chief clerk of the faculty, but by his deputy.

The bishop pleaded, that he claimed nothing but as ordinary; and set forth that this college was founded by *Charles the Second*, who appointed a warden thereof, and that all successive wardens should be bachelors of divinity, and that the said *Peploe* was not a bachelor of divinity; therefore he (the bishop) could not admit him to be warden.

S. C. Stra. 624.
3. Com. Dig.
"Courts"
(N. 5).
i. Bac. Abr. 624.

Upon issue joined, whether he was a bachelor of divinity or not, the cause was tried, and evidence was given, that the *Archbishop of Canterbury* had granted a faculty or degree of bachelor of divinity to the said *Peploe instantier*; that faculties were granted by the *Archbishops of Canterbury* for the time being, by custom and usage immemorial; and that this was confirmed to them by the statute 25. Hen. 8. c. 21.

THE COUNSEL for the defendant tendered a bill of exceptions to this evidence, which was over-ruled below: and thereupon a verdict was found for the king.

The defendant now brought a writ of error, and assigned the errors following:

FIRST EXCEPTION. It did not appear that this faculty was stamped, or that the duty was paid at the time it was enrolled in chancery, as it ought to be by virtue of the statute 9. & 10. Will. 3. c. 28. therefore it not being stamped when enrolled, it is void.

A faculty may be stamped, and thereby rendered valid, after it has been enrolled.
Cases Cro. Law.
221.
Esp. Dig. 777.

This was answered by THE COUNSEL on the other side, and RESOLVED BY THE COURT, that the stamp-act 5. & 6. Will. 3. c. 21. was only to secure the duty to the crown, and not to take away any evidence from the parties: the clause therein is, "that if any person shall write on parchment or paper charged with the duties payable by that and former acts, he shall forfeit ten pounds, and that it shall not be given in evidence till the duty and penalty is paid;" and it is every day's practice, that upon payment of the duty and penalty, the writing is made good.

SECOND EXCEPTION. This faculty was not subscribed and registered by the archbishop's clerk of the faculties, as required by the said statute 25. Hen. 8. c. 21.

2. Stra. 792.

TAKING
against
Bishop of
CHESTER.

As to this exception it was answered and resolved, that this faculty was not subscribed by the archbishop's clerk of the faculties but by his under-clerk, when it is expressly required by the statute 25. Hen. 8. c. 21. that it should be signed by the clerk himself, is very true; but the act is but directory, and it is not said, that it shall be signed by the chief clerk himself; so that this being signed by his under-clerk, and it being customary in this office for the under-clerks to sign faculties, this exception is of no weight.

THIRD EXCEPTION: That it was not subscribed and enrolled by the king's clerk of the faculties in *chancery*, as it ought, because he is empowered by the statute to tender an oath to the person who has obtained it; which statute was made to restrain the extravagant grants of THE POPE in those days; and therefore should be fully and strictly performed by the clerks themselves, and not by their deputy-clerks. And this must be intended by the legislators, for otherwise this act would have been penned as the statute of Wills (a), or as the statute* of Promissory Notes (b), by which it is enacted, that the signing shall be by the parties themselves, or by "any other person authorized by them." Therefore this must be done by the principal clerks themselves, and not by their under-clerks, for it is not assignable to them: and therefore this faculty is void, especially since there is a proviso therein, that it shall not be good till subscribed and registered by the clerk of the faculties in *chancery*, which is in the nature of a condition precedent, and not to be signed or subscribed by his order.

As to THE THIRD and chiefest exception, that there is a proviso in the faculty itself, that it shall not be good, unless subscribed and registered by the clerk of the faculties in *chancery*, IT WAS HELD, that where a man does any thing by the express order of another, as it was done in this case, it is as good as if done by himself; as where one expressly orders another to sign a deed which the person thus ordered did afterwards sign, this is good as one determinate act: but where a deputy doth any thing by virtue of general deputation, it must be where a deputy may be made by law.

The judgment was affirmed.

(a) 32. Hen. 8. c. 1. and 34. Hen. 8. c. 5.

(b) 3. & 4. Ann. c. 9.

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Case 294.

* Steed against Lateward.

The same notice must be given of executing a *scire fieri* enquiry as of executing a common writ of enquiry.

A JUDGMENT was obtained by default; the defendant died; and the plaintiff brought a *scire facias* against his executor to shew cause *quare inquisitionem non habet*, &c. and afterwards the writ of inquiry was executed.

IT WAS MOVED to set aside the execution thereof and to have restitution, for that the executor had no notice given of executing

S C. 2. Ld. Ray.

11. A. S C 1. Stra. 623. Stra. 235 2. Barnes, 237. Pract. Reg. C. P. 379. Rep. and Cal. of Pract. C. P. 1. 5. Com. Dig. "Pleader" (L. 2.).

this

this writ of inquiry until his goods were taken in execution. By a rule of court, notice is to be given on executing every writ of inquiry; and this is certainly a writ of inquiry: This point was adjudged in the case of *Cockley v. Delauney* (a).

11 Geo. 1.
against
Lateward.

FAZAKERLY contra. The practice of the Court has been contrary since that resolution; no notice is ever given on executing an *elegit*, where an inquisition is likewise taken, because it is only for the sheriff's information.

THE COURT. We cannot vary from that resolution. In ejectment, the constant course was to take out execution after the year, without any *scire facias*; but the Court thought proper to alter that course, by resolving that a *scire facias* was necessary. Upon the *fieri facias* the sheriff may return a *devastavit*; but by that return, if false, he subjected himself to an action, which by this method is prevented.

And afterwards, on THE MASTER's report, it was set aside, there being no difference between this and other writs of inquiry (b).

(a) Michaelmas Term, 12. Ann. Philips, 1. Stra. 235. See also Stead v. Pract. Reg. 379. Lateward, 2. Stra. 623. Gilb. Rep. 95.

(b) Resolved accordingly in Biron v.

The King against Tuck.

Case 295.

THE DEFENDANT was convicted before a justice of peace upon the statute 6. & 7. Will. 3. c. 11. made against profane cursing and swearing (a).

In an information on 19. Geo. 2. c. 21. if the defendant is charged with having forfeited two shillings, he shall be intended to be a gentleman.

Upon a motion to quash this conviction, the objections were as follow:

FIRST, By the statute, the person convicted is to forfeit two shillings for every oath, if he is not a common labourer, soldier, or sailor; now it does not appear upon the oath of the informer, that the defendant was a gentleman, and neither a common labourer, soldier or sailor.

THE COURT held, that it is not necessary to aver, that the defendant is not a soldier, sailor, or common labourer; for since he is charged with two shillings for every offence, it shall be intended that he is a gentleman, if so charged by the informer.

SECONDLY, It does not appear by this conviction of what age the defendant was, when he did profanely swear; for by the statute he must be above sixteen years old.

In a conviction for cursing and swearing, it shall be intended that the defendant was above sixteen years of age.

THE COURT held, that it shall be intended the defendant was of age, if so charged by the informer.

age.—S. C. 1. Sess. Cases, 354. S. C. 2. Ld. Ray. 1386.

(a) This statute is repealed by 19. Geo. 2. c. 21. s. 15.

THE KING
against
TUCKER

THIRDLY, This conviction is uncertain, for after the nature of the oath is set out, the witness swears, that the defendant repeated it sixteen times, for which he is convicted to forfeit thirty-two shillings, whereas a repetition presupposes a former act done; so he swore seventeen times; therefore the conviction does not agree with the evidence.

THE COURT. As to the not charging him with more than sixteen times, when it should be seventeen times swearing, it is but giving one oath free; and there must not be too much nicety in these convictions: in the case between *The King v. Sparrow (a)*, the conviction was quashed for not setting out the oath.

(a) Ante, 58.

Case 296.

The King against Dr. Shippen and Others.

In a prohibition the question was, Who is visitor of University College in Oxford?

IN A PROHIBITION, the case was, *Dr. Cockman* and *Dr. Dennison* were candidates for the mastership of UNIVERSITY COLLEGE in Oxford, and the first was declared master, but *Dr. Dennison* and the dissenting fellows of the college appealed to *Dr. Shippen*, the vice-chancellor, and others, as visitors.

And thereupon it was suggested by *Dr. Cockman*, in a prohibition, that this college was founded by *King Alfred* in the year 872, as by several inscriptions in the College it doth appear, and that the members thereof always commemorate that king in preaching, and all other public acts, and that the *Kings of England* were always visitors of that college, and no other person had any visitatorial power there.

This cause was referred to THE ATTORNEY and THE SOLICITOR GENERAL, and they were to report who was the founder of this college.

And they reported, that it was too difficult for them to determine after so long a time, who was the founder, and of greater difficulty to determine, whether the VICE-CHANCELLOR was visitor.

Thereupon a rule was made, that the defendant should shew cause why a prohibition should not go.

Case 297.

* Martin against Butdell.

After the want of a bill filed in such a Term, and certified by the Chief Justice, a bill shall not be filed of any other Term. S. C. ante, 283, 284.

UPON a judgment by default, and a writ of error brought in parliament,

The error assigned was thus: ff. "MEMORANDUM quod alias scilicet Termino Sancti Michaelis ultimo præterito coram domino rege apud Westm. venit T. S. &c. per JOHANNEM STONE attorn. suum et protulit hic in curia dicti domini regis tunc ibidem quendam billam suam, &c." when there was no such bill of that Term.

And

And upon a *certiorari* from the house of peers to the Chief Justice of the king's bench, he certified that there was no such bill.

Mistaken
against
Burgess.

Whereupon the plaintiff suggested a bill of another Term, and moved the Court that it might be filed; and had leave to move the house of lords for another *certiorari* directed to the Chief Justice, that he might certify the bill of that Term suggested; and that house ordered, that the plaintiff should have leave to sue out another *certiorari*, and allowed his suggesting a bill of another Term.

And now he moved the Court for leave to file a bill of the Term as suggested, as originals of another Term are allowed to be filed in the court of common pleas.

In the case of *Walmfley v. Corey (a)*, the MEMORANDUM was allowed to be amended by the bill. And this motion being made to support a judgment given in the court of king's bench, which was affirmed upon a writ of error in the exchequer-chamber; and a writ of error now brought in parliament, after a bill in chancery brought for relief, and that bill dismissed, the Court ought to do any thing in their power, after all these proceedings, to support this judgment, especially since the merits of the cause are entirely against the defendant; for otherwise he would have been relieved in some of those courts; and as the declaration is but the copy of the bill, so the bill may be taken from the declaration. In the case of *Calvert v. Castilian (b)*, it was held and so allowed, that a bill might be filed after the want of it was assigned for error, which shews that a bill may be filed at any time.

THE COUNSEL on the other side laid, that the motion was improper after it was certified that there was no such bill of that Term; and that the want of the bill is a good cause to be assigned for error, appears by the statute made for the amendment of the law, by which it is enacted, "that judgments by default, *nil dicit*, "or upon demurrer, shall not be reversed, if a bill * is duly filed;" * [369] which shews, that if it be not duly filed (as it was not in this case) such judgments shall be reversed. The court of common pleas will not admit the filing an original after the want of it is assigned for error; neither will this Court admit the filing a bill after the want of it is certified by the Chief Justice; if they should, they ought to do it in all cases, and consequently the omission of filing bills will be cured; and then it will be ludicrous to assign the want of them for error. It is true, this motion might have been proper before the Chief Justice had certified that there was no bill of that Term; for then the Court might indulge the plaintiff to file another bill; and that was the case of *Calvert v. Castilian*, but never after the Court hath certified, as in this case, that there was no bill of that Term, because a bill of any other Term will not warrant this memorandum, which recites, that the bill was of such

2. Stra. 735.
10. Vin. Abr.
39. pl. 47.

(a) Ante, 284.

(b)

MARTIN
against
BUNGEY.

a Term; therefore there being no bill of that Term, the judgment ought to be reversed. It is admitted, that the judgments in the common pleas are supported by originals of former Terms, which is done and allowed by entering continuances; but it does not follow from thence, that the judgments in this court may be supported by filing bills of any other Term than what is set forth in THE MEMORANDUM; for in the common pleas THE MEMORANDUM is general, without alledging it to be of any certain Term; but THE MEMORANDUM in the court of king's bench is, that the bill was of a Term certain, and by consequence cannot be warranted by a bill of any other Term.

[370]

* RAYMOND, *Chief Justice*. I see no difference between giving leave to file this bill, and granting an amendment after a writ of error brought.

FORTESCUE, *Justice*. It is expressly resolved 8. Co. 156. b. that what is amendable at common law is amendable at any time. This is the same as the case of *Winckworth v. Clarke (a)*, where continuances were permitted to be entered to the bill of *Middlesex* after a writ of error brought. I have often heard it said, that a bill of *Middlesex* may be filed at any time.

REYNOLDS, *Justice*. No writ of error will be ever brought, if after an assignment of it for error, it may be aided by filing a bill.

THE COURT. It cannot be filed but by motion in court. And upon considering the circumstances of the case, as here appears to have been the most affected delay, the bill may be filed of a Term precedent with continuances, so as to agree with THE MEMORANDUM.

Cur. adjurare vult.

(a) 2. Stra. 735. 10. Vin. Abr. 39. pl. 47.

Case 298. The King against The Parish of St. Mary Matfellow, Whitechapel.

Settlement of a poor man shall be in the parish where he serves and hath wages, and not in the parish where he lives.

A POOR man was hired for five years to work for ten shillings a week at a glass-house, in the parish of *Whitechapel*, from six in the morning until eight at night, and to find himself with meat, drink, washing, and lodging; and he lodged every night for the whole time, except one month, in the parish of *Whitechapel*, only not in his master's house.

S. C. Foley, 146.
S. C. 2. 545.
Case, 120.
Ante, 303.
Foley, 107.

This man was removed by an order of two justices from *Whitechapel* to *Ratcliffe*.

And upon an appeal to the sessions the order was quashed.

THE

Easter Term, 11. Geo. 1. In B. R.

THE COURT was of opinion that he was settled at *White-chapel* (a).

THE KING
against
THE PARISH
OF
ST. MARY
MATTHEW,
WHITECHA-
PEL.

(a) These orders were removed by *certiorari* into the King's bench. S. C. Foley, 146. The question was, Whether the statute 3. Will. & Mary, c. 11. extended to other than *menial servants*, S. C. 2. Bott, 457. HAWKINS, *Serjeant*, contended that it did not, and therefore as the pauper had never been any part of his master's family, he could not gain a settlement under this hiring and service, S. C. 2. Seff. Cases, 120. But THE COURT held, that the statute only requires a hiring and service for a year, and that it is not material whether the servant lives with the master or not, provided he lodges forty days in the parish, and there-

fore that he had gained a settlement in *Whitechapel*, S. C. 2. Seff. Cases, 121. See Bishop's Hatfield v. St. Peter's, Stra. 794. Rex v. Hemioak, Fort. 308. Goring v. Moleworth, 1. Bar. K. B. 436. Rex v. Ladoek, Burr. S. C. 179. Rex v. Crofcombe, Burr. S. C. 256. and 2. Bott's P. L. 457 to 485. And if a servant serve forty days in the parish of A. and forty days in the parish of B. and then return to A. and lodge there the last day, he gains a settlement in the parish of A. Rex v. Underhillbeck, 5. Term Rep. 387. Rex v. Brighthelmston, 5. Term Rep. 188.

William Maddox and Robert Godfrey against Taylor Case 299.
and Others.

TRESPASS for breaking and entering the house of *William Maddox*, and taking the goods of *William Maddox* and *Robert Godfrey*, *ad damnum ipsorum*; and a verdict for the plaintiffs, and entire damages.

Trespass for entering the house of A. and taking the goods of A. and B. is bad, if entire damages be given.

IT WAS MOVED in arrest of judgment, that this action could not be maintained, since the jury had given entire damages; for how can the plaintiff *William Maddox* (who had no right in the house, for that was in *Robert Godfrey*) recover damages for the unlawful entry?

S. C. 2. Ld. Ray. 1381.

So the judgment was arrested.

TRINITY TERM,

The Eleventh of George the First,

IN

The King's Bench,

1725.

Sir Robert Raymond, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*

Sir John Fortescue Aland, *Knt.*

James Reynolds, *Esq.*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Sir Clement Wearg, *Knt. Solicitor General.*

* Philips *against* Fish.

* [371]

Case 300.

IN AN ACTION ON THE CASE for these words spoke of the plaintiff, *viz.* "Thou art a villain and thief;" *quorum quidem verborum pro palatione* the plaintiff was not only much damaged in his fame and reputation, *verum etiam arreſtat. fuit* by procurement of the defendant, and carried before a justice of peace, and there imprisoned, &c.

Upon *not guilty* pleaded, the plaintiff had a verdict, and one shilling damages.

The question was, Whether he should have full costs?

GAPPER, *for the defendant*, insisted, that the plaintiff should have no more costs than damages; for, by the statute 22. & 23. *Car. 2. c. 9.* it is enacted, "That in all actions of trespass, assault, and battery, and other personal actions, wherein a Judge shall will, upon a general verdict, entitle the plaintiff to full costs.—*Cro. Car. 163. 307. 1. Stra. 192. 646. 936. 2. Ld. Ray. 1589. 2. Kel. 71, 72. 2. Bar. K. B. 113. Bull. N. P. 11. Hullock on Costs, 33. 2. Bl. Rep. 1062. 2. Burr. 1688. 3. Com. Dig. "Costs" (A. 3.) Andr. 375. 1. Term Rep. 955. 1. H. Bl. Rep. 291. 5. Term Rep. 482.*

" not

Philips
against
Fisk.

"not certify upon the back of the record that a battery was proved, or the title of the lands chiefly in question, if the jury find under forty shillings damages the plaintiff shall have no more costs;" and this being an action on the case for words, is a personal action, and the jury having given but one shilling damages, the plaintiff shall have no more costs.

* [372]

LEE for the plaintiff argued, that in this case full costs ought to be given, because the action is not only for words, but the plaintiff expressly averred, that the defendant procured him to be arrested for felony, which is a distinct fact laid, besides the words, and not by way of aggravation; but, if it was, there is * no case to prove that full costs ought not to be given.

THE COURT. If the fact that comes under the *verum etiam* is only laid in aggravation of damages, so that the words are the *git* of the action, then the plaintiff can have no more costs than damages; but if it be laid as a distinct fact for which another action might be brought, then he shall recover full costs (a). Actions of *scandalum magnatum*, and for slandering a man's title, are actions for words, and yet not within the statute of 21. Jac. c. 16. nor the statute intended only to prevent frivolous actions for words. It is true, where a trespass is laid with a *per quod*, &c.; as for instance, "*per quod servitium*, &c." or "*per quod consortium uxoris amisit*," there whatever comes under the *per quod* must be proved, otherwise the plaintiff cannot have a verdict, because that is the *git* of the action; but in the principal case the action is founded on the words spoken, and the procuring the plaintiff to be arrested for felony is laid in a different count, and the defendant is found guilty generally.

THE COURT therefore inclined, that the plaintiff should have full costs.

(a) *Anderton v. Buckton*, Hilary Term, 5. Geo. 1. in the king's bench.

* [373]

Case 301.

* Moorfoot against Chivers.

The allowance of a writ of error is a *superfeda* from the time of signing judgment, although it was not served; for that is only to bring the party into contempt.

S. C. 1. Sta.

631.

R. Salk. 321.

R. Lev. 512.

R. Bl. Rep.

1183.

UPON A MOTION to set aside an execution, the case was, that a writ of error was allowed about two of the clock in the afternoon, and about the same time the execution was served.

IT WAS INSISTED, that from the time of the allowing the writ of error the hands of the Court are tied up; and if so, the execution is irregular, and ought to be set aside.

All which was admitted on the other side, if notice had been given of the allowance of the writ of error before the serving the execution; otherwise it is regular; but here the plaintiff in the writ of error did not give the defendant any notice that it was allowed.

1. Term Rep. 279. 2. Term Rep. 44. 78. 5. Com. Dig. "Pleader" (3. B. 12.).

THE

Trinity Term, 11. Geo. 1. In B. R.

THE COURT was of opinion, that if the plaintiff in error could shew that the writ was sued out, and allowed before the execution was served, it must be set aside, though the defendant had not any notice of it (a).

Moore v.
 against
 CHIVRE.

(a) It is said, S. C. 1. Stra. 632. that the Court set the execution aside, saying, that although the not being served with the allowance of the writ of error was no contempt, yet in point of law it was a *superfedeas* from the moment of pronouncing judgment.—And see Jaques v. Nixon,

that the allowance of the writ of error is a *superfedeas*, which operates only from the time of signing judgment, and that the service of it is only to bring the party into contempt, if he proceeds, 1. Term Rep. 279.

Welsh against Craig.

Cafe 302.

IN AN ACTION OF DEBT ON A PROMISSORY NOTE, the defendant demurred to the declaration.

Debt will not lie upon a PROMISSORY NOTE, but an *indebitatus assumpsit*.

The question was, Whether the action of debt would lie?

It was said, that it would not lie against *the indorser*, but that it would lie against *the drawer* (a). By the statute 3. & 4. Anne, c. 9. it is enacted, "That all notes signed by any person, promising to pay to another, or order, or bearer, the money mentioned in such note, shall be construed to be due and payable to such person to whom it is made payable;" but though it is due and payable to the person, a general *indebitatus assumpsit* will not lie for it, for want of a consideration; for a bill of exchange is only an evidence of a promise to pay, and is no more than *nudum pactum*; but a general *indebitatus assumpsit* will lie against *the drawer*, not upon the custom of merchants, but for so much money received to the plaintiff's use, and the plaintiff may give the note in evidence.

S. C. 1. Stra. 680. Hard. 485. 1. Mod. 285. 1. Vent. 152. 1. Freem. 14. 1. Lev. 298. 1. Salk. 125. 12. Mod. 37. 345. Skin. 346. Kyd on Bills, 113. Bailey on Bills, 47.

THE COURT were clearly of opinion, that no action of debt would lie on A PROMISSORY NOTE, declaring thereon; but the plaintiff might have brought an *indebitatus assumpsit*, declaring generally, and so have given the note in evidence. By the custom of merchants, no remedy was given on foreign bills of exchange but by action on the case. The statute of 9. & 10. Will. 3. c. 17. has given the same remedy to inland bills, and the 3. & 4. Anne, c. 9. to promissory notes (b). An *indebitatus assumpsit* will not lie on a bill of exchange.

THE COURT, however, gave the plaintiff leave to discontinue on payment of costs.

(a) 1. Mod. Ent. 312. Morg. Prec. 548.

(b) The 3. & 4. Anne, c. 9. has put promissory notes upon the same footing as

bills of exchange in all respects, Brown v. Haraden, 4. Term Rep. 148.—See also Carlos v. Fancourt, 5. Term Rep. 482.

Case 303.

* Vaughan against Evans.

The grand sessions in Wales cannot serve process out of the jurisdiction of the court; and therefore they cannot sequester the lands of a man who lives in London for non-appearance; for they cannot legally serve him with a *subpœna*.

S. C. 2. Ld.
Ray. 1408.
S. C. 1. Stra.
630.
Roll. Abr. 540.
Hutt. 59.
14 Ray. 698.

PROHIBITION to the court of grand sessions in *Wales*. The case was thus: *Evans* had a mortgage of lands within the jurisdiction of that court, which lands were afterwards purchased by *Vaughan*, as he pretended, and he got into possession by undue means. Then *Evans* the mortgagee filed a bill against him in that court, and against another who lived within the jurisdiction, but *Vaughan* lived in *London*, and was served with a *subpœna* there; and not appearing upon the service of the *subpœna*, the plaintiff *Evans* procured a sequestration of this land, which lay within the jurisdiction of that court, and then, and not till then, *Vaughan* moved for a prohibition.

It was now argued, that a *prohibition* ought not to go, because it was absolutely necessary to make *Vaughan* a defendant jointly with the other who lived within the jurisdiction. Besides, the COURT OF GRAND SESSIONS is a court of original jurisdiction, though circumscribed as to place; and this being a personal process, may be as well served in *London* as the process of the court of chancery may be served in *Paris* or in *Dublin*, or elsewhere out of this realm, or the process of the court of chancery may be served here, which is done every day. It is true, that court cannot issue an attachment, or any other process for a contempt out of their jurisdiction, which may be a reason for sequestering the lands within their jurisdiction, until the party shall obey their process. And this being the method of superior courts, it is reasonable the same method should be pursued in this COURT OF GRAND SESSIONS; * and the case of *Tranter v. Diggan (a)* is no authority against it, because it did not appear in that case that the plaintiff had any lands within the jurisdiction.

* [375]

THE COURT demanded of the Counsel, why the plaintiff did not dismiss his bill in the COURT OF GRAND SESSIONS, and exhibit a new bill in the court of chancery here.

TO WHICH it was answered, it would be very hard on the defendant in this *prohibition* so to do; for if he should bring a new bill here, they would plead the proceedings below in *abatement* of that suit. Besides, if the plaintiff below should dismiss that bill, he must not only bear the expence of all those proceedings, but must likewise pay costs to the defendant for the supposed wrongful proceeding there.

THE COURT. The court of grand sessions have no jurisdiction in this case; for *sequestration* cannot issue but after a personal notice; and no personal notice can be given to the defendant who lives in *London*; because their process can only be served in their own district, the remedy in this case would be in *chancery*, which

Trinity Term, 11. Geo. 1. In B. R.

has jurisdiction over all *England*. But yet *chancery* hath no jurisdiction into *Wales* or *Ireland* (a).

VAUGHAN
against
EVANS

Let there be a prohibition.

(a) *Quære*, Then how to come at both these defendants, when each lives within a jurisdiction that excludes process out of the other. SIR JOSEPH JEXELL, Master of the Rolls, said, in *Frederick v. Frederick*,

heard 25 March 1732, that the process of the court of chancery might be served in *Wales*, on a petition.—NOTE to former edition.

Blackett against Finny.

Case 304.

UPON A BILL exhibited to establish a *modus*, the plaintiff set forth, that this *modus* was payable on or about the twenty-fifth day of *April*, &c. which is a void *modus*, because it must be payable on a certain day, as was lately resolved in the case of *Harrison and Clarke*.

A *modus payable* on or about such a day is not good; for the day must be certain.

S. C. Bunb.
176. 198.

Besides, it is laid disjunctively in the bill, *viz.* that the parishioners of, &c. “constantly paid, or ought to pay, so much,” when it should be, “constantly paid, and ought to pay,” &c. Then as to the *modus* for sheep, it is laid, that the parishioners usually paid fourpence for every score, and so *pro rata*, but does not shew what they should have paid for a less number, in case there were not so many as a score.

The defendant put in his answer; and amongst other things admitted, that the *modus*, as set forth in the bill, was payable on or about the twenty-fifth day of *April*, &c. but the plaintiff perceiving the faults in his bill, as before-mentioned, moved for leave to amend, and cited the case of *Reynolds v. Rogers*, where the plaintiff suggested a *modus*, but did not lay it payable on any certain day, neither did the defendant in his answer confess any day of payment; so that no certain day of payment appearing, either in the bill or answer, the defendant who was plaintiff in a cross-bill having * laid it to be payable on a certain day, it was held good.* [376]

THE COURT. This is a case where an amendment of these things will not alter the nature of the proofs; and the day being admitted by the defendant in his answer, it is reasonable that on payment of costs the plaintiff should amend, especially since his right appears on the pleadings; therefore it would be too rigorous not to give him leave to amend, for in such case the decree must be founded on his bill; and if his bill will not support it, though a day is confessed in the defendant's answer, he can have no good decree.

Case 305.

Cowper against Spencer.

In an action of assault and battery, if the defendant plead *per patriam*, and the plaintiff reply *de injuria sua propria*, and conclude to the country, and no issue taken thereon by entering a *similiter* for the defendant, it is informal, and not amendable.

S. C. 1. Stra. 641.
1. Com. Dig.
"Amendment" (O.).

AFTER A VERDICT for the plaintiff in an action of assault and battery, it was moved in arrest of judgment, for that no issue was joined in the cause, it being, "*et hoc petit quod inquiratur per patriam*;" then these words should follow, "*et prædictus*" (the defendant) "*similiter*," which were omitted.

ON THE OTHER SIDE it was said, that there is no occasion for amending this issue, because the appearance of the defendant is entered on THE POSTEA; besides, at the worst, it is only an informal issue, and that is amendable.

THE COURT. In indictments for treason there is no *similiter* entered (a), and this Court must be guided by precedents, whether it is in this case amendable.

At another day the following cases were cited, to shew that it was amendable. In *Fitzherbert* (b), an action was brought against several; they all pleaded, and in the replication one only joined in issue by a *similiter*, and yet it was held amendable; and in *Dyer* (c), the entry was, "*et prædictus similiter*," leaving out "the defendant," and it was held amendable; and in the cases cited in the margin (d), mis-entries were adjudged to be amendable; and it was my Lord Coke's opinion, that the misprision of a clerk in a record may be amended; and in the case of *Davis v. Acherly* (e), in an action on three promissory notes, the defendant pleaded, as to two of them, that the drawee *non indorsavit*, and as to the third *non assumpsit* generally, *et prædictus* (the plaintiff) *similiter*; and after verdict for the plaintiff, he was allowed to enter his judgment on the first issue; therefore if any amendment is necessary, it must be in this case, especially since it is plain by THE POSTEA that the defendant appeared.

[377] * THE COURT. In every material issue joined, there must be a verdict on one side, otherwise there can be no judgment, and the plaintiff would now have judgment for damages on a verdict found on an *informal issue*, as he alleges it to be, but on *no issue* joined, as the defendant says: now there is a difference between an *immaterial* and an *informal* issue joined, and where there is *no issue* at all joined; and the cases cited in the margin are, where the issues were informally joined; as where it is said in the entry, "*et prædictus defendens similiter*," where it should be, "*prædictus*" (the plaintiff) "*similiter*;" in which case the issue is tendered by the defendant; but in the principal case the issue was tendered by the plaintiff, and never joined by the defendant; so there was no issue at all: which seemed to the Court not amendable (f).

(a) See Harris's Case, Cro. Jac. 502.

(b) Fitz. Abr. "Amendment," fo. 32.

(c) Dyer, 160, 161.

(d) 2. Roll. Rep. 200. Cro. Eliz.

752. Cro. Car. 435.

(e)

(f) The Court were all of opinion,

that it was a fatal objection, and not amendable; and the judgment was arrested, S. C. 1. Stra. 642.—But see the case of *Sayer v. Pocock*, where a replication was amended after verdict, by inserting the *similiter* instead of "*&c.*" Cowp. 407.

Turner against Mosse.

Case 306.

WRIT OF ERROR on a judgment given in the common pleas in an action on the case.

A declaration
quod cum ipse
idem, &c. instead
of ipse idem, &c.
is good.

The error assigned was, for that there being but one defendant, the plaintiff had declared, *pro eo VIDELICET quod cum ipse idem* the defendant, &c. instead of *ipse idem, &c.*

3. Bull. 82.
Cro. Jac. 377.
1. Salk. 325.
3. Com. Dig.
"Pleader"
(C. 28.).

But the judgment was affirmed, for the word "*ipse*" is but surplusage; and if it had been left out, the declaration would have been good without it.

The King against Venables.

Case 307.

TWO JUSTICES made an order to suppress an alehouse, upon the statute of 5. & 6. *Edw. 6. c. 24.* which order was not observed.

In what case justices at sessions may make a second order to suppress an alehouse.

The justices at the sessions, therefore, made another order, in this form: "IT BEING made only to appear to us that *J. Venables* hath acted contrary to the former order, IT IS HEREBY ORDERED, that he be committed to the county-gaol, there to remain for three days, and until he enters into a recognizance with two sureties no more to sell ale, &c."

This last order being removed into this court,

REEVE moved to quash the same, because it does not appear in the order, that the defendant was duly summoned, so had no opportunity to defend himself; for if he had been summoned, he might have shewed some cause against the making this order: as for instance; he might have a licence from other justices to sell ale in the mean time. * A summons is necessary in all convictions. * [378]

S. C. Sett. &
Rem. 120.
S. C. 2. Ld.
Ray. 1405.
S. C. 1. Scilicet
Cases, 267.
S. C. 1. Stra.
630.
S. C. Fort. 325
Ante, 3. 101.
154.
4. Com. Dig.
"Justices of
Peace" (R.
26.).

And though this is not an order of conviction, yet it is not merely to carry the former order into execution, because some new fact must be proved as a ground for this punishment; and natural justice requires, that the defendant should be summoned and heard before he is condemned. And so it was held in the case of *The Queen v. Dyer (a)*, which was a conviction on the statute 1. *Jac. 1. c. 7.* for embezzling yarn, setting forth, that "WHEREAS complaint had been made to T. S. and E. G. &c. and whereas the defendant was duly summoned to appear before them, and by virtue thereof did appear on Tuesday the seventeenth day of April," whereas the seventeenth day of April was on a Friday; and for that reason the conviction was quashed; for it was held, that a summons was necessary, and that the time to appear upon such summons was impossible, because there was no such day as Tuesday the seventeenth of April, therefore it was as if there had been no summons at all. And in the case of *The Queen v.*

(a) Salk. 181.

THE KING
against
VENABLES.
Fortesc. Rep.
103.
Q. B. Cal. 132.
Ante, 154.

Green (a), Hil. 12. Anne, a conviction for selling bread contrary to THE ASSISE was, that the defendant *debite modo summonitus fuit, et non apparuit*; and the Court held, that the summons itself ought to have been set out; for they would not intend a good summons.

FAZAKERLY, *against the defendant*, argued, that in convictions of this nature it is never necessary to set out, that the defendant was summoned. The case of *The Queen v. Dyer* is different; for if a bad summons be shewn, the Judge cannot intend a good one (b). In the case of *Rex v. Theed* (c); which was a conviction upon the Candle Act, which gives the officer power to enter in the day-time by himself, or in the night with a constable; and the conviction only said that the officer *lawfully entered*, without specifying whether in the day, or in the night; but this objection was overruled, because the Court would intend the entry lawful. There is a difference between judicial and ministerial acts; for in the one, all things shall be intended regular until the contrary appears: now, the suppressing an alehouse is a judicial act; for by the statute the justices of peace have a judicial power to suppress them *ad libitum*; and therefore the Court will intend that the defendant was duly summoned. But in ministerial acts it is otherwise; for in such cases all must appear to be right, and nothing shall be so by intendment: as for instance; in the return of a *mandamus* all must appear to be regular, because the returns are made by ministerial officers.

RAYMOND, *Chief Justice*. The case of *Rex v. Clegg* was never determined; but the Court then said, that the objection had never prevailed. There is a great difference between setting out a bad summons and no summons at all. In the first, there is no room to suppose a good summons; otherwise in the latter case; for if the justices make the conviction without a summons, they are liable to an information. Must we presume the defendant was not summoned? There is no instance where an order was quashed for this exception. Whether an appeal lies or no makes no difference, because the order must appear good on the face of it.

FORTESCUE, *Justice*. Since the justices had jurisdiction, we will not presume that they acted against their duty; this objection never prevailed; it differs from a bad summons shewn.

Afterwards, on deliberation, the order was confirmed (d).

(a) Hilary Term, 32. Anne. 10. Mod. 212.

(b) *Rex v. Clegg*, ante, 3.

(c) Ante, 320.

(d) But it afterwards appearing to the Court, by affidavits, that the justices in

sessions had, in fact, made the order without summoning Venables, or affording him an opportunity of being heard, they gave leave to file AN INFORMATION against them for this misconduct. 2. C. 2. bd. Ray. 1407.

* The Mariner's Case.

Case 308.

LIBEL in the court of admiralty for *mariner's wages*. The plaintiff suggested for a prohibition & contract reduced into writing for the wages.

Mariners may sue in the admiralty for wages, although they are due by written contract.

But the prohibition was denied, for the Court always indulges mariners to sue in THE ADMIRALTY, because, by the course of that court, many of them may join in the suit, and it is the cheapest and most expeditious method to recover their wages. If there is any special contract, as is now suggested, the defendant may plead it in that court; and if they do not allow that plea, then it may be a proper time to move the court of king's bench for a prohibition; for if it should be granted before the plea is disallowed, it is a prejudging the justice of that court.

1. Vent. 146.
3. Lev. 60.
2. Show. 86.
1. Salk. 33.
Stra. 937. 707.
353.
1. Id. Ray. 577.
2. Id. Ray.
1247. 1206.

4. Burr. 1944. 1. Com. Dig. "Admiralty" (E. 15.).

Beach against Hobbs.

Case 309.

IT was ruled by the Court, that to leave a declaration in the office before the *effoin-day* of the Term is a complete delivery thereof, if notice be given in writing to the attorney on the other side, and he refuses to pay for the copy; but all attorneys ought to deliver a copy of the declaration to the defendant's attorneys, where they are known, and willing to pay for it; but if not known, or refusing to pay for it, then it must be filed in the office before the *effoin-day* of the Term, and the attorney for the defendant must have notice of it before the *effoin-day*, otherwise he shall have an *imparlance* of course.

If a declaration be filed, it is a good delivery only from the time notice is given to the defendant or his attorney.

2. Id. Ray.
1407.
Tidd's Pract.
231.

3. Burr. 1452. 2. Term Rep. 112. 5. Com. Dig. "Pleader" (C.).

Anonymous.

Case 310.

REPLEVIN. The defendant justified the taking the cattle *damage feasant*; and it was now moved to stay proceedings, on bringing into court what was due with costs.

In replevin, the money due on the bond may be paid into court.

Ante, 305-345.

THE COURT. If you bring in what is due upon the replevin-bond, proceedings shall be stayed, but if it is to stay proceedings on payment of what is due for damages, it shall not be granted, because the Court has no rule to guide them in such case; but it is otherwise for rent, for that is certain (a).

5. Com. Dig.
"Pleader"
(C. 10.).

(a) See *Hallet v. East India Company*, 2. Burr. 1120. *Bonafous v. Rybot*, 3. Burr. 1370.

* Cambridge against Lea.

* [380]

Case 311.

ERROR ON A JUDGMENT in an action brought on a policy of insurance.

False Latin cited by a ver-

CAMBRIDGE
against
LEA.

The error assigned was, for that after the plaintiff had set forth that the ship was laden with goods, and bound from such a place to such a place, and insured, that *navis prædicta et bona prædicta submersa fuit*: whereas the goods only, and not the ship, were insured.

Moor, 888.
Vent. 114.

THE COURT. This being only an insurance on the goods, nothing could be given in evidence at the trial but the loss thereof, without which evidence the plaintiff could never have a verdict; and as to the word "*fuit*," it is only false *Latin*, and cured by the verdict.

So the judgment was affirmed.

Case 312.

The King against Harwood.

"*Non fuit electus*"
is no good return
to a *mandamus* to
swear a church-
warden.
See ante, 325,
contra.

S. C. 2. Ld.
Ray. 1405.

A MANDAMUS was directed to the defendant, *Dr. Harwood*, as official to the archdeacon of *L.* to swear *T. S.* churchwarden of the parish of *H.* who returned, that *T. S. non fuit electus*.

Issue was taken thereon, and a verdict for the king.

CHAPPEL, *Serjeant*, moved in arrest of judgment, Because the return of *non electus* is a bad return, the archdeacon being no judge of the election. *The King v. Simpson (a)*, *Rex v. Archdeacon of Cardigan (b)*, *The Queen v. Guy (c)*.

THE COURT. The return is a void return; the writ of *mandamus* commands the defendant to swear the churchwarden, or to return cause why he cannot swear him. Now he may return some causes as an incapacity; for that he is judge of; but he cannot deny the election; for that he is no judge of. The archdeacon is only a ministerial officer, and therefore bound to swear him. The swearing is only matter of form; because a churchwarden may act before he is sworn. The office of a churchwarden is a temporal office (*d*).

And THE COURT made a rule for a *peremptory mandamus, nisi, &c. (e)*.

(a) Ante, 325.

(b) 8. *Wm.* 3.

(c) 6. *Mod.* 80.

(d) *Rex v. White*, 1. Ld. Ray. 1379.

(e) This rule was made against the inclination of *RAYMOND*, *Chief Justice*, and *REYNOLDS*, *Justice*, and was afterwards discharged; and the Court not being unanimous, the case was put into the paper to be argued again, but it was never

stirred again. *LORD RAYMOND*, however, adds, "there can be no doubt but such a return is good," S. C. 2. Ld. Ray. 1405; and it is said in the argument of the case of *Rex v. Ward*, that it was determined to be a good return, *Strange*, 895.—And see *Rex v. Simpson*, ante, 325. *Rex v. Jannet Regis*, Dougl. 80 to 86.

TRINITY TERM,

The Twelfth of George the First,

I N.

The King's Bench.

1726.

Sir Robert Raymond, *Knt. Chief Justice.*

Sir Lyttleton Powis, *Knt.*

Sir John Fortescue Aland, *Knt.* } *Justices.*

James Reynolds, *Esq.*

Sir Philip Yorke, *Knt. Attorney General.*

Sir Clement Wearg, *Knt. Solicitor General.*

Cowper against Ginger.

Case 313.

RAYMOND, *Chief Justice*, delivered the opinion of the Court, that the writ of error *coram vobis* well lay; for that the record was removed by the first writ of error. The case of *Walter v. Stokoe*, in *Hilary Term*, 1693, is a case in point; and there no question was made, but that the record was removed by the first writ of error. •

Ante, 316.

MICHAELMAS TERM,

The Twelfth of George the First,

I N

The King's Bench.

Sir Robert Raymond, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir John Fortescue Aland, Knt.

James Reynolds, Esq.

} *Justices.*

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

* *Phillips against Fish.*

* [382]

Case 314.

NOW THE COURT, after deliberation, delivered their opinion, that the plaintiff was intitled to full costs; for as this declaration is worded, the arrest and imprisonment are charged as distinct acts, for which the plaintiff might have brought a distinct action, and consequently they cannot be esteemed only acts laid for aggravation of damages. *Gro. Car.* 163. Ante, 371.

Let there be full costs.

Warren against Conset.

Case 315.

IN *Easter Term*, in the thirteenth year of *George the First*, the judgment of the common pleas was affirmed in the court of king's bench by the whole Court; for that the action being founded on the articles, and the particular facts being but auxiliary to the deed, the plea of *nil debet* was no good plea. Ante, 106. 3^d

E A S T E R T E R M,

The First of George the Second,

I N

The King's Bench.

Sir Robert Raymond, Knt. Chief Justice.

Sir John Fortescue Aland, Knt. }

James Reynolds, Esq. }

Edmund Probyn, Esq. }

Justices.

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Shaw against Weigh.

Case 316.

RAYMOND, *Chief Justice.* This case stands for the opinion of the Court. The term made to the plaintiff in ejectment is expired; and though we cannot restore the party to his possession, yet we may give judgment. The judgment upon this special verdict below was, *quod querens nil capiat per breve*; and we are all of opinion, that this judgment ought to be reversed.

The resolution of the Court on a case by devise. Ante, 255. Fortesc. Rep. 70. 2 Stra. 322. Fitzgib. 17.

THE FIRST POINT before the Court is, What estate the trustees have by the will, as no words of inheritance are made use of in the limitation to them.

And WE ARE ALL OF OPINION, that the trustees took an estate of inheritance by implication; for the intention of the testator was, that they should take such an estate as would support the several trusts in the will; and they being estates of inheritance, the trustees must have an estate of inheritance to support such trusts, as *1. Roll. Abr. 611.* But this being given up on the first argument, we need not labour it.

THE SECOND POINT is, What estate the testator's sisters, *Dorothy* and *Anne*, took by the will? If they took an estate-tail, *Dorothy* might levy a fine, and suffer a recovery to bar the lessor of

SEAY
against
WEIGH.

the plaintiff, and consequently the judgment below would be good; but if the sisters took only an estate for life, the fine and recovery were a forfeiture of the estate, and no bar to the lessor of the plaintiff.

* [383]

And WE ARE ALL OF OPINION, that the sisters took only an estate for life, with remainders in tail to their issues. For first, after the death of his wife, the testator gives it "in trust for *Anne* " and *Dorothy*, equally betwixt them, during their natural lives." Here if it had rested, it would be an express estate for life to them: and then he declares his intention by saying, "they shall commit no "manner of waste." Now can it be said, that he intended them an estate of inheritance, when he obliges them not to commit any waste? But to proceed: He provides, that "if the five hundred "pounds, or any part, be paid by his said * sisters, that then they "may raise such money by digging of coals only;" so that he restrains their power to digging of coals only. The power his wife had was to sell, or cut and sell timber, or dig coals, &c.; but no such power is given to the issues, because it is plain he intended the sisters should take an estate for life, and the issues an estate in tail; so there was no occasion to give them a power which they had by virtue of the estate given to them.

Then the will goes on, "and if either of my said sisters die, "leaving issue or issues, &c. then in trust for such issue or issues of "the mother's share, or else in trust for the survivor or survivors of "them." The question upon this is, Whether "issue or issues" are words of limitation, or a *designatio personæ*. At common law, "issue" is not a word of limitation in deeds, *Coke Second Institute*, 334. and in case of an use, the same law; for if a feoffment is made to the use of J. S. and his issue male, this does not pass an estate-tail: but in wills "issue" is sometimes a word of limitation, and sometimes a word of purchase, according as the testator's intention appears in the will.

Ante, 256.

The case of *Loddington v. Kime*, in 3. *Lev.* 431. is not well reported. I heard it argued *seriatim*, and the case was adjudged, that *Ivers Amin* took only an estate for life; and that point remained unshaken in chancery and the house of lords; so that "issue" there was judged a good word of purchase, though an estate for life was given to the father of the issue.

Ante, 261.

The case of *Blackbart v. Wells*, *Hil.* 12. *Anne*, is a strong case: There the devise was to *A.* for life only, and after his death to his issue, and the heirs of such issue; and that was adjudged an estate for life in *A.* and the "issue" was a word of purchase, though *A.* took an estate for life; and what the Court mostly relied on in that case was, the intention of the testator appearing from the words only, and the limitation over to the heirs of the issues.

Now here the intention appears as plainly, that the sisters were to take an estate for life only, as I have partly shewn; then the words

words "survivor or survivors" shew the issue were to take by purchase, for "survivors" cannot relate to sisters, there being but two. And the will goes further, "and their respective issue or issues;" so that the issue of the sisters were to take an estate which was to descend to their issues; and when an estate for life is given to one, and after to his issue, with a limitation over to his issue of such issue, the first takes only an estate for life, and the issue take as purchasers. The case of *Clerk v. Day*, reported in *Cro. Eliz.* 313. 1. *Roll*; *Abr.* 832. and *Moor*, 593. is to that purpose; yet I doubt none of these books have stated it as it is on the roll; yet *Moor* is the last, and says it was adjudged, and he is a judicious reporter; the other two were young at that time; but as in *Moor*, the testator devised "to his daughter * for life, and if she marry * [384]
" after my death, and have issue of her body, &c. then I will, that
" her heir after my daughter's death shall have the land, and to
" the heirs of their bodies begotten:" and it was adjudged, that the daughter took only an estate for life, and her heirs an estate of inheritance by purchase.

SHAW
against
WEIGH.

The case of *King v. Melling*, reported in 2. *Lev.* and 1. *Vent.* has been strongly relied on for the defendant. That case, I agree, is established, but there is no occasion to carry it one jot further; and we are of opinion it does not come up to this case; there is not a limitation over, as in this case, "to the issues of the issue;" and if *Hale's* opinion be truly reported in that case, he is clearly of opinion, if there had been a limitation over "to the issues of the issue," the devisee had taken only an estate for life, and the word "issue" had been a word of purchase.

Another objection is, that if the sisters do not take an estate-tail by the words already mentioned, yet they are tenants in tail by the subsequent words, *viz.* "and if my sisters die without issue, and their issue or issues die without issue, then, &c." These words, they say, give them an estate-tail by implication, as in the cases of *Sutton v. Panton*, and *Langley v. Bainton*, the last of which was in 1707. I answer, in these cases it is limited only to the first, second, third, and fourth; so that all the issues that may be are not comprehended in the words of purchase; and therefore the words "if he die without issue" may, by implication, operate so as to give the father an estate-tail, for the fifth son could not take as a purchaser, because it is only to the first, second, third, and fourth son; and then the words, "if he die without issue, then the remainder over:" so that as long as he has issue the remainder cannot take effect; but here the words are general, and take in all the issues.

The case of *Popham v. Banfield*, in *Salk.* 236. is ill reported; Ante, 260. for the Book says, it was a devise to A. for life, remainder to his first, and so to his tenth son; but the material words "and to all" and "every other son" are left out; but in *Dyer*, 171. it is said, that an implication shall never ride over an express limitation; and therefore if an estate is devised to A. for life, and after to his first

Easter Term, 1. Geo. 2. In B. R.

SNARE
against
WEIGH.

first son, and the heirs of the body of such first son, and if *A.* die without issue, then over, in that case *A.* shall not have an estate by implication, because there is an express limitation in tail to his first son.

Another objection is, that this cannot be a *descriptio personæ* as comprehending male and female. I answer, it is a good word of purchase, by the plain intention of the testator. There was another point as to the cross-remainders, but that is now out of the case, and we are of opinion the sisters were only tenants for life.

So the judgment was reversed *per totam Curiam*.

2. Stra. 805.

Afterwards this cause went up into the house of lords, on a writ of error brought by *William Sparrow* and others, and was (a) argued by Mr. Attorney (b) General and MR. BOOTLE to make it an estate-tail, and by MR. FAZAKERLY and MR. STRANGE to make it but an estate for life; and all the Judges being ordered to attend took time to consider of it; and

Fitzgib. 30.
2. Stra. 805.
Eq. Cas. Abr.
185.

On 28th April 1729, nine were of opinion, that it was but an estate for life, viz. RAYMOND, PRICE, PAGE, REYNOLDS, HALE, CARTER, DENTON, PROBYN, and COMYNS; and the Lord Chief Justice EYRE, the Lord Chief Baron PENGELLY, and Mr. Justice (c) FORTESCUE, held it an estate-tail.

Fortesc. Rep.
50.

Before the lords gave judgment, the learned *Bishop of Chichester*, *Doctor Hare*, stood up, and said, he did not pretend to understand the niceties of the law, but this question seemed to him very much to depend upon a grammatical construction of the words of the will, and perceived that the three Judges who differed from the rest seemed to argue from the grammar of it; and he was of opinion, that according to grammatical construction he should rather think "survivor or survivors" should be most properly referred to the sisters rather than to the issue; and thereupon the house of lords, *nemine* (d) *contradicente*, gave judgment according to the opinion of the said three Judges, and reversed the judgment given by the king's bench.

(a) See the arguments in Fitzgib. 25.

(b) Sir Philip Yorke.

(c) See his argument in Fortesc. Rep.

82.

(d) Many lords who were of opinion to

affirm being gone away, the judgment of B. R. was late at night reversed, upon a division of ten lords against seven, 2. Stra. 805.

A
T A B L E
O F.
P R I N C I P A L M A T T E R S
CONTAINED IN THE
E I G H T H V O L U M E.

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2. An action of trover lies here for a conversion in *Ireland*, *Walrond v. Van Moses*, 322
3. For the plaintiff may lay the conversion here, and prove it was done in *Ireland*; but this is otherwise in local actions, *Walrond v. Van Moses*, 322
4. In trover, the conversion is the point in issue, for which a certain time and place must be alledged, *Huxer v. Gapan*, 177
5. See trover for *South-Sea* stock transferred to the defendant by one who personated the plaintiff, *Monk v. Graham*, 9
6. In trover for a horse, if the inn-keeper seize for several nights, it is evidence of conversion, *Jones v. Thurloe*, 172. 173
7. Though he may detain a horse for one night's meat, yet he cannot sell it and pay himself; if he do, it is a conversion, 172
8. In trover for a ring, moved to bring it into court denied; but leave was to amend the declaration, *Huxer v. Gapan*, 176, 177

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